IN THE

Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in rejecting this Court's state actor tests and instead creating a *per se* rule that private operators of public access channels are state actors subject to constitutional liability.

2. Whether the Second Circuit erred in holding—contrary to the Sixth and D.C. Circuits—that private entities operating public access television stations are state actors for constitutional purposes where the state has no control over the private entity's board or operations.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners Manhattan Community Access Corporation ("MNN"), Daniel Coughlin, Jeanette Santiago, and Cory Bryce were Defendant-Appellees in the court of appeals in No. 16-4155. Petitioner Manhattan Community Access Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Respondents DeeDee Halleck and Jesus Papoleto Melendez were Plaintiff-Appellants in the court of appeals in No. 16-4155.

The City of New York was a Defendant-Appellee in the court of appeals in No. 16-4155 but is not a petitioner.

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JURISDICTION

The Second Circuit issued its opinion on February 9, 2018 and denied MNN's petition for rehearing *en banc* on March 23, 2018. MNN timely filed this petition for writ of certiorari on June 21, 2018. *See* 28 U.S.C. § 2101(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves U.S. Const. amend. I, "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATEMENT OF THE CASE

This case presents an important—and unsettled—recurring question of law: Under what circumstances can a private entity (here a private operator of a public access channel) be deemed a state actor, subject to claims under the First Amendment? Twenty-two years ago, this Court chose not to address that issue in *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996). Justice Breyer, writing for the plurality, "found it 'unnecessary' and 'unwise' for the Court to 'definitively ... decide whether or how to apply the public forum

doctrine to leased access channels,'" and, by extension, public access channels. Pet. App. 47a-48a (quoting *Denver Area*, 518 U.S. at 749). Justice Thomas concluded in his partial concurrence that privately operated public access channels *are not* public forums, while Justice Kennedy in his partial concurrence argued that public access channels *are* designated public fora—regardless of who operates them.

The decision below perpetuates a deep split within the federal courts and creates a circuit split between the Second Circuit (on one hand) and the Sixth and D.C. Circuits (on the other) on this important issue. But the split goes deeper than the result. The Second Circuit abandoned this Court's state actor analysis and applied a fundamentally flawed new rule—a rule that would sweep nearly all public access operators, and potentially many other private entities, into the "state actor" category. The D.C. and Sixth Circuits, on the other hand, applied this Court's traditional state actor tests and reached the opposite result on similar facts.

Applying this Court's traditional state actor tests: the public function test; the state compulsion test; and the joint action test (as the dissenting judge below and the district court correctly did), leads to the inexorable conclusion that MNN is not a state actor. The same result obtains by applying this Court's test in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), which is appropriate where, as here, a private entity was created pursuant to a governmental designation. The Second Circuit ignored this Court's direction for determining under which rare circumstances private entities would be treated as state actors and applied its own unprecedented test.

A. The Regulatory and Contractual Framework for Public Access

Cable operators must obtain franchises from local governments to lay the cable or optical fibers needed to reach subscribers. Pet. App. 35a. Cable franchise agreements in New York City (the "City") require private cable operators to set aside public access channels, which are then operated by private nonprofit entities. *Id.* at 35a-36a. The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (the "1984 Cable Act") prohibits cable operators from exercising editorial control over public access channels. 47 U.S.C. § 531(e).

Similarly, the New York State Public Service Commission's ("PSC") regulations prohibit cable television franchisees and local governments from exercising editorial control over public access channels. 16 N.Y. COMP. CODES R. & REGS tit. 16, § 895.4(c)(8)-(9) (2018). The PSC regulates cable television in New York and hears challenges by, among others, public access producers to ensure that public access channels are operated fairly and comply with state regulations. *See Amano v. City of New York*, 04-V-0321, 2006 WL 4470759 (N.Y.P.S.C. Aug. 30, 2006).

The City awarded cable franchises in Manhattan to Time Warner Entertainment Company, L.P. ("Time Warner"). Pet. App. 36a. Section 8.1.1 of the franchise agreements provides that Time Warner must set aside certain cable channels for public access and that these channels must be operated by an "independent, not-for-profit membership corporation" designated by the Manhattan Borough President. *Id.* at 36a-37a. Nearly

three decades ago, the Manhattan Borough President designated MNN to operate the public access channels set aside in Manhattan. *Id.*

B. Manhattan Neighborhood Network

MNN is a private nonprofit corporation that was incorporated in 1991. *Id.* at 5a, 9a. While the Manhattan Borough President designated MNN as the private nonprofit to operate the public access channel in Manhattan, the Borough President has no control over MNN and can choose only two of the thirteen or more members of MNN's Board of Directors. *Id.* at 37a. The remaining directors are independent. *Id.* MNN owns and has offices (and its main studio) on West 59th Street in Manhattan. MNN also owns and maintains a community facility in East Harlem known as the MNN El Barrio Firehouse Community Media Center. *Id.* MNN receives no funding from the City.

C. Facts Giving Rise To This Action

Respondents are public access producers in Manhattan. *Id.* at 34a. MNN took disciplinary action against Respondents for violating its rules and regulations. Specifically, MNN suspended Mr. Melendez from a leadership program in March 2012 for harassing an MNN employee (and from all MNN services and facilities in 2013 for similar conduct). *Id.* at 38a-40a. Thereafter, Mr. Melendez and Ms. Halleck appeared in and produced a video called "The 1% Visit El Barrio," which included harassing and threatening language directed toward MNN staff during a long diatribe by Mr. Melendez, spoken while standing outside one of MNN's properties:

> Our people, our people, people of color, are in control of this building and I have to wait until they are fired, or they retire, or ***someone kills them*** so that I can come and have access to the facility here.

Id. at 39a (emphasis added). MNN aired the program on October 2, 2012, but, after receiving complaints from its staff, barred further airings that included the offending language that violated MNN's zero tolerance policy on harassment. *Id.* at 40a. Ms. Halleck was suspended in 2012 for airing the video. *Id.*

Respondents also posted the video on YouTube, where it remains. *See* DeeDee Halleck, *The 1% Visits El Barrio; Whose Community?*, YouTube (July 29, 2012), https://www.youtube.com/watch?v=QEbMTGEQ1xc.

D. Procedural History

On October 15, 2015, Respondents filed a Complaint against Petitioners, the City, and Iris Morales, who was then an MNN employee, alleging violations of 42 U.S.C. § 1983, Article 1 Section 8 of the New York State Constitution, and New York's Open Meetings Law, claiming they were damaged as a result of their respective suspensions. Pet. App. 34a-35a. Respondents later amended their complaint and removed Ms. Morales as a defendant.

1. The District Court Proceedings

On March 18, 2016, Petitioners and the City moved to dismiss the Amended Complaint. The district court

granted the motion in an Opinion and Order dated December 13, 2016. *Id.* at 34a-53a.

The district court dismissed the First Amendment claims against the City, following *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 690 (1978). The district court noted that Respondents' "sole allegation against the City [was] the bald assertion that it was 'aware that MNN has censored plaintiffs' and other cable access programming.'" Pet. App. 43a.

The district court also dismissed the First Amendment claims against Petitioners, finding that Respondents had failed to establish that MNN was a state actor subject to constitutional liability under Section 1983. *Id.* at 53a. The court also held that this Court's test in *Lebron* was not satisfied because "among other things, the Manhattan Borough President only has the authority to appoint two of MNN's thirteen board members." *Id.* at 44a.

The district court then discussed this Court's other state actor tests, which the Second Circuit described at length in *Sybalski v. Indep. Grp. Home Living Program Inc.*, 546 F.3d 255, 257 (2d Cir. 2008). Pet. App. 45a. In finding that the "public function" test was not satisfied, Judge Pauley noted that "regulation of free speech in a public forum is 'a traditional and exclusive public function'" and acknowledged that the "public function" test *would be satisfied* if a public access channel was a constitutional public forum like a sidewalk or park. *Id.* at 45a-46a. But the district court determined that a public access channel is not such a public forum.

The district court observed that the circuit courts to have considered the issue (the D.C. and Sixth Circuits) both held that public access channels are not constitutional public forums and district courts have been divided on the issue. The district court also noted that a plurality of this Court in *Denver Area*, 518 U.S. 727, "found it 'unnecessary' and 'unwise' for the Court to 'definitively ... decide whether or how to apply the public forum doctrine to leased access channels,'" and, by extension, public access channels, although Justice Kennedy would have held that public access channels *are* designated public fora and Justice Thomas would have held that *they are not*. Pet. App. 47a-49a (quoting *Denver Area*, 518 U.S. at 749).

In granting MNN's motion to dismiss, the district court acknowledged that "there is no clear precedent governing whether public access channels are public fora," and considered the issue to be "a close call"—but held that public access channels are not constitutional public fora, adopting what it termed "the consensus view of courts within the Second Circuit." *Id.* at 50a-51a (citing *Morrone v. CSC Holdings Corp.*, 363 F. Supp. 2d 552, 558 (E.D.N.Y. 2005); *Glendora v. Tele-Commc'ns, Inc.*, No. 96-cv-4270, 1996 WL 721077, at *3 (S.D.N.Y. Dec. 13, 1996); *Glendora v. Cablevision Sys. Corp.*, 893 F. Supp. 264, 270 (S.D.N.Y. 1995)).

The district court rejected Respondents' argument, based on the Second Circuit's holding in *Loce v. Time Warner Entm't Advance/Newhouse P'ship*, 191 F.3d 256, 267 (2d Cir. 1999), that "public access channels are designated public fora because they are 'required by government fiat.'" Pet. App. 52a. The district court held that "MNN is a private entity that operates

television channels, and '[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty.'" *Id.* at 51a (quoting *Glendora*, 893 F. Supp. at 269).

2. Appellate Proceedings

Respondents filed a timely Notice of Appeal to the Second Circuit on December 14, 2016.

On February 9, 2018, the Second Circuit issued a splintered decision, with two Justices (Newman and Lohier, JJ.) affirming the district court's holding as to the City but reversing as to Petitioners.

The majority opinion (Newman, J.) ("Majority") acknowledged that, because MNN is a private entity, "the viability of the Plaintiffs' First Amendment claim against it and its employees depends on whether MNN's actions can be deemed state action." *Id.* at 9a (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001)). But instead of applying this Court's state action tests, the Majority simply asked "whether the public access channels ... are public forums." *Id.* at 10a.

Relying on Justice Kennedy's *Denver Area* concurrence, the Majority held that:

> where, as here, federal law authorizes setting aside channels for public access to be 'the electronic marketplace of ideas,' state regulation requires cable operators to provide at least one public access channel, a municipal contract

> requires a cable operator to provide four such channels, and a municipal official has designated a private corporation to run those channels, those channels are public forums.

Id. at 13a-14a. Having concluded that public access channels are public fora, the Majority then noted that, "whether the First Amendment applies to the individuals who have taken the challenged actions in a public forum depends on whether they have a sufficient connection to governmental authority to be deemed state actors." *Id.* at 14a. The Majority summarily concluded that the necessary connection between MNN and the City "is established in this case by the fact that the Manhattan Borough President designated MNN to run the public access channels." *Id.* at 14a-15a.

The Majority then attempted to distinguish its holding from *Loce*, 191 F.3d 256, where the Second Circuit determined that "[t]he fact that federal law requires a cable operator to maintain leased access channels and the fact that the cable franchise is granted by a local government are insufficient, either singly or in combination, to characterize the cable operator's conduct of its business as state action." *Id.* at 267. The Majority distinguished *Loce* on the basis that it involved "leased access" as opposed to "public access" channels. Pet. App. 16a.

The Majority acknowledged that the D.C. and Sixth Circuits "have not considered public access channels to be public forums." *Id.* The Majority noted that the *en banc* court in *Alliance for Community Media v. F.C.C.*, 56 F.3d 105, 123 (D.C. Cir. 1995) ("*ACM*"), *reversed in part on*

other grounds sub nom., Denver Area, 518 U.S. at 768, found "no state action ... because that essential element cannot be supplied by treating access channels as public forums." Pet. App. 16a. The Majority also acknowledged its rejection of the Sixth Circuit's holding in *Wilcher v. City of Akron*, 498 F.3d 516 (6th Cir. 2007), that the private operator of a public access channel was not a state actor after applying the traditional state actor tests (and not engaging in public forum analysis). Pet. App. 16a n.8.

Judge Lohier's concurrence added that "in the specific circumstances of this case we might also rely on the public function test" to find state action. *Id.* at 19a. Judge Lohier concluded that MNN exercised the "traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels" because MNN's programming relates to "in a word, democracy." *Id.* at 20a. In reaching this conclusion, Judge Lohier took judicial notice of cherry-picked portions of MNN's website, which were not part of the record below, and concluded that MNN largely offered political-type programming, ignoring the other programming and non-government-related functions MNN provides. *Id.*

The concurrence acknowledged that its "public function" analysis was in direct conflict with the Sixth Circuit's *Wilcher* decision. Whereas *Wilcher* found a public access operator was not performing a public function because "TV service is not a traditional service of local government," the concurrence held that it was inappropriate to look at public access as simply an "entertainment facility." *Id.* at 19a.

In his dissent, Judge Jacobs noted that the "[M]ajority's conclusion that MNN is a state actor opens a split with the Sixth Circuit; considerably worse, it opens a split with the Second Circuit." *Id.* at 33a. Judge Jacobs noted that "[a] private entity may become a state actor *only* under the following limited conditions," and listed this Court's state action tests as described by the Second Circuit in *Sybalski*, 546 F.3d at 257. Pet. App. 23a (emphasis added).

The dissent examined each test and concluded that none were satisfied. The dissent determined that the "compulsion test" was not met because "MNN's designation in a franchise agreement and regulation by a municipal commission do not in and of themselves demonstrate that MNN is 'controlled' or 'compelled' by the state." *Id.* at 23a-24a. Moreover, Respondents made "no allegation of government involvement in the[ir] suspensions from which state action can be inferred." *Id.* at 24a. The dissent found that the "joint action" test was not satisfied because neither "the statutory guidelines for cable access [n]or the borough's oversight activities establish joint action" and because the *Lebron* factors did not mandate a finding of state action. *Id.* at 24a-25a. The "public function" test, according to the dissent, was not satisfied because "[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty." *Id.* at 25a. The dissent concluded that "it is fortunate for our liberty that it is not at all a near-exclusive function of the state to provide the forums for public expression, politics, information, or entertainment." *Id.* at 26a.

The dissent also noted that "[a] ruling in favor of MNN will be consistent with our precedent in *Loce*." *Id.* at 33a. The dissent would have held that *Loce* controlled and that administering access channels does not constitute state action. "The logic of *Loce*," according to the dissent, "applies with equal force to public-access programming" because "[c]able operators are equally obligated to provide both 'forums': federal law requires them to set aside a portion of their capacity for leased access ... and permits franchising authorities to require (as the relevant one does) a similar set-aside for public access" and, "if anything, the *Loce* analysis applies to public-access channels *a fortiori*." *Id.* at 27a-28a.

By Order dated March 23, 2018, the Second Circuit declined to grant Petitioners' petition for rehearing. *Id.* at 54a-55a.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT IGNORED THIS COURT'S STATE ACTION TESTS AND CREATED AN IMPROPER *PER SE* TEST

The Majority held—as a matter of law—that Manhattan's privately owned and operated public access channels are *constitutional* public fora and that the private owner and operator (and its employees) are therefore state actors subject to constitutional liability. In reaching that conclusion, the Majority ignored this Court's tests for determining when private parties can be deemed state actors.

A. This Court's State Actor Tests

This Court has identified as a "great object of the Constitution" the goal of "permit[ting] citizens to structure their private relations as they choose." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). "It is a fundamental fact of our political order" that constitutional liability is only applied to conduct "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-937 (1982); *see also Edmonson*, 500 U.S. at 620 ("conduct of private parties lies beyond the Constitution's scope in most instances" and only where private entities "must be deemed to act with the authority of the government" are such private actors "subject to constitutional constraints"); *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982) (discussing same) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974)).

Public Function Test. The "public function" test considers whether a private entity is performing a function traditionally and exclusively performed by government. *See Jackson*, 419 U.S. at 352-53; *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). This inquiry, by design, has "carefully confined bound[aries]" because "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158, 163 (1978).

Compulsion and Joint Action Tests. In *Blum*, the Court set out another basis for state action, paving the way for the development of the "compulsion" and "joint action" tests: "when [the state] has exercised coercive power or has provided such significant encouragement, either

overt or covert, that the choice must in law be deemed to be that of the state." 457 U.S. at 1004; *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (private insurers not subject to constitutional requirements where the state neither coerced nor encouraged the insurer's actions); *Rendell-Baker*, 457 U.S. at 839-40 (applying *Blum* analysis to determine that private school for special needs students was not state actor, even though it received public funds and was heavily regulated, where challenged employment decision was not coerced or influenced by the state). Even where there is "extensive state regulation of private activity, we have consistently held that '[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the [Constitution].'" *Sullivan*, 526 U.S. at 52 (quoting *Jackson*, 419 U.S. at 350); *cf. Lugar*, 457 U.S. at 942 (private party's "invoking the aid of state officials to take advantage of state created attachment procedures" was "joint participation with state officials ... sufficient to characterize that party as a 'state actor'"). Indeed, even when "a private entity performs a function which serves the public[,] [this] does not make its acts state action." *Rendell-Baker*, 457 U.S. at 842.

Most recently, in *Brentwood*, this Court considered whether a private interscholastic athletic association was a state actor. *See* 531 U.S. at 290. A divided Court held that, where the association was comprised mostly of public schools, mostly publicly funded, run by public school officials, and the association's members were eligible for state retirement benefits, the "nominally private character of the Association [w]as overborne by the pervasive entwinement of public institutions and public officials in its compositions and workings," sufficient to

find state action. *Id.* at 298. The majority held: "'[c]oercion' and 'encouragement' are like 'entwinement' in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead." *Id.* at 303. A vigorous dissent by Justice Thomas, joined by Justices Rehnquist, Scalia, and Kennedy, argued that the association was not a state actor "as a matter of common sense or under any of this Court's existing theories of state action, [and] the majority presents a new theory." *Id.* at 312.

This Court followed a different approach in *Lebron*, when it considered whether Amtrak was a state actor when it selected content for public displays in New York's Penn Station. *See* 513 U.S. at 401. Justice Scalia's majority opinion noted it was "unnecessary to traverse that difficult terrain [of deciding when private action might be deemed that of the state]" because Amtrak, which was created by a federal statute and whose board was entirely government-appointed, was "an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." 513 U.S. at 378, 394. The *Lebron* Court held that, "where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 399.

B. The Decision Below Ignored This Court's Tests

The Majority chose not to apply any of this Court's state actor tests—the public function test, the compulsion test, or the joint action test—in concluding that MNN is a

state actor.[1] Nor did the Majority mention in its analysis (much less apply) this Court's *Lebron* test, applicable where a private entity is created by government.[2]

The dissent, on the other hand, examined each of this Court's tests and correctly determined that MNN was not a state actor. The dissent found no allegations that "MNN is 'controlled' or 'compelled' by the state" sufficient to satisfy the "compulsion" test.[3] *Id.* at 23a-24a. Nor, according to the dissent, is the fact that the Borough President designated MNN to run Manhattan's public access channels—*twenty seven years ago*—sufficient, by itself, to satisfy the "joint action" test, which requires a

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1. All of this Court's state actor tests had previously been applied by the Second Circuit. *See Sybalski*, 546 F.3d at 257-59.

2. Had the Majority considered *Lebron*, it would have had to conclude, as the district court did, that the *Lebron* test was not satisfied "because, among other things, the Manhattan Borough President only has the authority to appoint two of MNN's thirteen board members." Pet. App. at 44a. This point is critical because the Majority—in searching for a "sufficient connection to governmental authority"—relied *solely* on the fact that the Manhattan Borough President, in 1991, *designated* MNN to run Manhattan's public access channels. *Id.* at 14a-15a. Based on this fact, which is commonplace for public access channels nationwide, the Majority concluded that MNN and its employees are state actors. But, under *Lebron*, this fact should have been the beginning of the inquiry, not the end of it. And the court would have had to conclude that MNN is not a state actor because there were no allegations of any governmental control of MNN or its board.

3. Moreover, any inference of "compulsion" should have been dispelled when the Second Circuit affirmed the dismissal of the City of New York. Indeed, the only plausible allegations were that MNN acted alone.

showing that there is a "close nexus between the State and the *challenged action*." *Blum*, 457 U.S. at 1004 (emphasis added and citation omitted). The dissent also concluded that MNN did not meet the public function test because it was not performing a function *traditionally* and *exclusively* performed by government.

While the Majority ignored the public function test, Judge Lohier in his concurrence offered that the court "might also rely on the 'public function' test." Pet. App. 19a. Judge Lohier reviewed MNN's website (which was not in the record) and concluded that MNN was performing a traditional and exclusive government function because:

> [its] programming relates to political advocacy, cultural and community affairs, New York elections, religion—in a word, democracy.

Id. at 20a.

But this analysis is deeply flawed. Certainly the quad of a private college looks and feels like "democracy" with people of all shapes and sizes, creeds, races, and political views expressing opinions, but that does not transform it into a *constitutional* public forum. Indeed, Judge Lohier's application of the public function test is a radical departure from how the "public function" test is traditionally applied, which requires a "stiff" analysis, with "carefully confined bound[aries]," as to whether the private actor is engaging in a specific function (here, operating a public access channel) belonging traditionally *and* exclusively to government. *Flagg Bros.*, 436 U.S. at 163; *see also Wilcher*, 498 F.3d at 519.

C. The Second Circuit Created an Improper *Per Se* Rule

Instead of applying this Court's state actor tests, the Majority, relying on dicta in Justice Kennedy's *Denver Area* concurrence, created what is essentially a *per se* rule: public access channels are always public fora and, therefore, their private operators are state actors subject to constitutional liability.

This Court has repeatedly cautioned that the state action analysis is a "necessarily fact-bound inquiry." *Brentwood*, 531 U.S. at 298; *see also Edmonson*, 500 U.S. at 621 (state action analysis "is often a factbound inquiry"); *Lugar*, 457 U.S. at 939 (application of state action tests is a "necessarily fact-bound inquiry that confronts the Court"); *Blum*, 457 U.S. at 1004 ("the factual setting of each case will be significant" in performing the state action analysis).

In *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), this Court cautioned against *per se* tests for state action:

> Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested. Owing to the very 'largeness' of government, a multitude of relationships might appear to some to fall within the [Constitution]'s embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present.

Id. at 725-26 (citation omitted); *see also id* at 722 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.").

The Majority here attempted to avoid running afoul of this proscription by claiming that it was limiting its holding to just the facts alleged in this case and stating that it was not "determining whether a public access channel is necessarily a public forum simply by virtue of its function in providing an equivalent of the public square." Pet. App. 13a. But the Majority's reasoning squarely contradicts that aspiration.

The Majority held:

> where, as here, federal law authorizes setting aside channels for public access to be 'the electronic marketplace of ideas,' state regulation requires cable operators to provide at least one public access channel, a municipal contract requires a cable operator to provide four such channels, and a municipal official has designated a private corporation to run those channels, those channels are public forums.

Id. at 13a-14a.

Those same criteria (authorized by federal law, mandated by state law, and designated by a franchise authority) will apply to most—if not all—privately operated public access channels, all of which are creatures of federal and state law and local contracts. The holding, therefore, amounts to a *per se* test, meaning that all (or

nearly all) public access channels would be considered constitutional public fora, regardless of the actual nature and degree of government control over the channel and regardless of the particular operator. This adoption of a hard-and-fast rule is inconsistent with this Court's caution against categorical rules and ignores the far more critical issue of whether (and to what extent) there is government control over a public access channel.

By adopting Justice Kennedy's suggestion in his *Denver Area* concurrence that public access channels should be deemed "designated public forum[s] of unlimited character," 518 U.S. at 791, and ignoring this Court's other state action tests, the Majority firmly placed the cart before the horse. It determined first that public access channels are public fora and then determined that the operators of such public fora are therefore state actors. But in *Denver Area*, seven other Justices either rejected or declined to consider Justice Kennedy's suggestion.

Justice Breyer's plurality decision in *Denver Area* explicitly refused to determine the nature of the forum at issue, finding it "premature." *Id.* at 742, 743-66. And Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia), would have held that public access channels *are not* constitutional public fora. *Id.* at 826. As Justice Thomas wrote, "[c]able systems are privately owned and privately managed, and petitioners point to no case in which we have held that government may designate private property as a public forum." *Id.* at 827. Justice Thomas also noted that "regulatory control, and particularly direct regulatory control over a private entity's First Amendment speech rights, could [not] justify creation of a public forum." *Id.* at 829. Justice Thomas concluded that

"the numerous additional obligations imposed on the cable operator in managing and operating the public access channels convince me that these channels share few, if any, of the basic characteristics of a public forum." *Id.* at 831.[4]

Characterizing public access channels as *per se* public forums is plainly inconsistent with this Court's state actor tests. In addition, the *per se* rule ignores the fact that, as this Court explained in *Denver Area*, public access channels have historically been run in various configurations and, most importantly, by a diverse set of operators: "Municipalities generally provide in their cable franchising agreements for an access channel manager, who is most commonly a nonprofit organization, but may also be the municipality, or, in some instances, the cable system owner." *Denver Area*, 518 U.S. at 761 (plurality opinion). More than twenty years later, that is still the

4. Courts after *Denver Area* have—for the most part—rejected the arguments that public access channels are *per se* public fora. *See, e.g.*, *Clorite v. Somerset Access Television, Inc.*, No. 14-10399, 2016 WL 5334521, at *10 (D. Mass. Sept. 20, 2016) ("courts have routinely held that public access channels are not First Amendment 'public forums'") (internal citation omitted); *Morrone*, 363 F. Supp. 2d at 558 (same); *Glendora*, 1996 WL 721077, at *3 (same); *Glendora v. Hostetter*, 916 F. Supp. 1339, 1341 (S.D.N.Y. 1996) (same); *Glendora*, 893 F. Supp. at 270 (same); *see also Hebrew v. Houston Media Source, Inc.*, No. 09-cv-3274, 2010 WL 2944439, at *6 (S.D. Tex. July 20, 2010) ("[T]his court has found no circuit court or Supreme Court case holding that a public access local cable channel operates as a public forum or that its operator is a state actor."). *But see Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 52 (D. Me. 2002) (predicting that court would treat channel as a designated public forum); *Britton v. City of Erie, Pa.*, 933 F. Supp. 1261, 1268 (W.D. Pa. 1995) (holding that "a public-access cable television channel is a public forum").

case.[5] The Majority's *per se* test threatens to obscure these differences. All cable operators in New York and many other states are *required* to set aside public access channels by a combination of federal law, state regulation, and franchise agreements. Under the Majority's analysis, this arrangement would convert all private operators of these channels—including cable operators like Time Warner—into state actors.[6]

The Second Circuit's failure to follow this Court's tests and its imposition of a *per se* test warrant a grant of certiorari.

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5. There are over two thousand community access stations across the country run by a diverse mix of private non-profit entities, cable operators, educational institutions, governmental entities, and others. *See* Community Media Database, http://communitymediadatabase.org/ (last visited June 19, 2018) (select Community Access TV / Spreadsheet Directory; listing community access stations in each state along with category of operating entity).

6. Courts around the country have acknowledged that forum analysis in this particular context is difficult and lacking in guidance from this Court. *See, e.g.*, *Horton v. City of Houston, Tex.*, 179 F.3d 188 (5th Cir. 1999) ("the public forum doctrine should not be extended in a mechanical way to the very different context of public television-broadcasting"; forum analysis presented a "conundrum," which the court did not ultimately address) (internal citation omitted); *Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 91, 93 (D. Mass. 2002) (whether public access channel is a public forum is "open to debate" and noting that, "[f]ortunately, this motion does not require the court to resolve the *Denver Area* conundrum"); *see also Egli v. Strimel*, No. 14-cv-6204, 2015 WL 5093048, at *4 (E.D. Pa. Aug. 28, 2015) (*Egli I*) (discussing same).

II. THERE IS A CLEAR CIRCUIT SPLIT—AND WIDE DISAGREEMENT AMONG DISTRICT COURTS—ON WHETHER A PRIVATE OPERATOR OF A PUBLIC ACCESS CHANNEL CAN BE DEEMED A STATE ACTOR AND WHICH TESTS COURTS SHOULD APPLY TO ADDRESS THAT QUESTION

The Majority, concurrence, and dissent below all agree that the circuits are split on a foundational constitutional question: Under what circumstances can a private entity (here a private operator of a public access channel) be deemed a state actor, subject to claims under the First Amendment? In addition to reaching a different answer, the Second Circuit also conflicts with its sister circuits by failing to apply this Court's tests for determining those rare circumstances where private activity can be deemed state action.

A. The Sixth and D.C. Circuits Have Held on Similar Facts That Private Operators of Public Access Channels Are Not State Actors

The Sixth and D.C. Circuits have considered whether private operators of public access channels are state actors. Both Circuits applied this Court's traditional state actor tests and—unlike the Second Circuit—concluded that these private operators are not state actors.

In *Wilcher*, the Sixth Circuit considered a television producer's First Amendment claim against a private operator of a public access channel. *See* 498 F.3d at 518-19. There, the City of Akron had granted a private entity, Time Warner, a nonexclusive franchise to operate the

city's cable television system. In the franchise agreement, Akron required Time Warner to set aside a public access channel "to broadcast programming submitted by members of the community." *Id.* at 518. Time Warner was entitled to promulgate rules and regulations for the public access channel, but—unlike here—these rules were subject to approval by a city official. *Id.* In 2004, Time Warner instituted new rules regarding explicit material, a mandatory administration fee for the submission of videos, and a residency requirement. The city approved those changes, prompting a producer to file suit claiming the new rules violated her First Amendment rights. *Id.*

The district court granted Time Warner's motion to dismiss for failure to allege state action, and the Sixth Circuit affirmed. The Circuit noted that "[i]t is undisputed that First Amendment protections are triggered only in the presence of state action. A private party, acting on its own, cannot ordinarily be said to deprive a citizen of her right to Free Speech." *Id.* at 519. The Court acknowledged that "[a] private entity, such as Time Warner, can be held to constitutional standards 'when its actions so approximate state action that they may be fairly attributable to the state.'" *Id.* (quoting *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000)).

In determining that the cable operator was not a state actor, the court applied the three established "state action" tests to determine "whether private action is fairly attributable to the state." *Id.*

- ***Public Function Test***. The Sixth Circuit rejected the argument that, because some local governments (though not Akron) manage public

access channels, operating a public access channel is necessarily a "public function." The court cited the "relatively stiff test applied by the Supreme Court in *Metropolitan Edison*," which required a showing that the private entity exercise "a power *reserved exclusively to the state*." *Id.* at 519 (citing *Jackson*, 419 U.S. at 351) (emphasis added). The Sixth Circuit concluded that "TV service is not a traditional service of local government ... [and] cannot fairly be characterized as a function traditionally reserved to the state." *Id.*

- ***Compulsion Test***. The Sixth Circuit held that this test was not met because "[a]lthough the franchise agreement provides for a public access channel," plaintiff did not allege that the city had encouraged or coerced the challenged conduct. *Id.* at 519-20.

- ***Joint Action test***. The Sixth Circuit also found no "sufficiently close nexus" between Akron and Time Warner, rejecting the argument that "Time Warner and city officials worked 'hand-in-glove' to enact the [complained of] regulations." *Id.* at 520. Instead, the Sixth Circuit held that the city "simply approved a decision made by a private party per a contractual arrangement between the two." *Id.* That "Time Warner accepted certain regulatory constraints" did not make it a state actor. *Id.*

The Sixth Circuit implicitly rejected the alternate argument that public access channels are *per se* constitutional public fora and the private operators of such channels are therefore state actors. *Id.* at 519.

In *ACM*, the *en banc* D.C. Circuit also applied the traditional state action analysis and determined that the private operator of a public access channel was not a state actor. *See ACM*, 56 F.3d at 123.

In *ACM*, the D.C. Circuit considered the constitutionality of three sections of the 1984 Cable Act (as amended by the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act")). *Id.* at 110. One part of the 1992 Act, section 10(c), authorized cable operators to prohibit programming on PEG (public, educational, or governmental use) channels if the programming was "obscene" or "indecent." *Id.* at 112. In its analysis, the D.C. Circuit considered whether "decisions of cable operators not to carry indecent programs on leased or PEG access channels," decisions permitted by Section 10(c), should be "treated as decisions of the government"—*i.e.*, whether private cable operators who exercise discretion granted by Congress were state actors. *Id.* at 113.

The court applied each of the traditional tests and found no state action.

- ***Public Function Test***. The court held that "determining what programs shall be shown on a cable television system is not traditionally within the exclusive province of government at any level" and the "federal statute authorizing action by private cable operators is therefore not itself sufficient to trigger the First Amendment." *Id.* at 113.

- ***Compulsion Test***. The D.C. Circuit found this test was not met because Section 10(c) merely affords

operators the *choice* to ban certain programming, and held that the statutory provisions coupled with the fact that "a cable operator takes this into account in deciding which programs to carry ... does not convert its refusal to carry indecent programming into state action." *Id.* at 121. In other words, "'[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives.'" *Id.* at 116 (quoting *Blum*, 457 U.S. at 1004-05).

- ***Joint Action test***. The *ACM* Court found no "sufficiently close nexus" between the cable operator and the government by virtue of the editorial discretion the government allowed the cable operator to restrict certain types of programming, noting that this regulatory scheme only "restore[d] to cable operators editorial discretion an earlier statute had removed," and did not demonstrate a government nexus. The regulatory scheme, without more, "simply adjusted editorial authority between two private groups" (the cable operators and the producers). *Id.* at 115.

Unlike the Majority below, the D.C. Circuit rejected the suggestion that "by calling leased access and PEG channels 'public forums' they may avoid the state action problem and invoke the line of First Amendment decisions restricting governmental control of speakers because of the location of their speech." *Id.* at 121. The court concluded: "Because we find no state action here and because that essential element cannot be supplied by

treating access channels as public forums, we do not reach petitioners' First Amendment attack on sections 10(a) and 10(c)." *See id.* at 123.

On appeal, this Court, in *Denver Area*, 518 U.S. at 737-42, found that the state actor inquiry was not necessary to determine the constitutionality of the statute and instead considered whether the regulations were sufficiently tailored—leaving that portion of the D.C. Circuit's decision holding that public access channel operators are not state actors undisturbed.

Seven years after *Denver Area* was decided, the D.C. Circuit once again found that the private operator of a public access channel was not a state actor in *Glendora v. Sellers*, No. 03-7077, 2003 WL 22890043 (D.C. Cir. Nov. 25, 2003). There, a public access producer sued a private, nonprofit operator of a public access channel. The district court held that because "decisions regarding the programming on public access cable channels in the District of Columbia [are not alleged to] in any way [be] controlled by the District of Columbia government," "there is no state actor and thus no viable Section 1983 claim." *Glendora v. Sellers*, No. 1:02-cv-00855, slip op. at 6 (D.D.C. March 31, 2003), ECF No. 14. The D.C. Circuit affirmed the district court's opinion. *See* 2003 WL 22890043, at *1.

Given the divergent results *and* analysis among the Second, Sixth, and D.C. Circuits, this Court should grant certiorari to resolve this split and provide guidance on this issue.

B. There is Wide Disagreement Among District Courts About Which Test To Apply on this Issue

The question presented in this case is not only sowing confusion in appellate courts. There is also widespread disagreement among the federal district courts leading to disparate treatment for parties across the country.

District courts nationwide have applied different tests and reached divergent conclusions on the potential constitutional liability of private operators of public access channels. Many courts have held that the private operators are not state actors—but have reached this conclusion by engaging in different analyses. *See, e.g.*, *Loren v. City of New York*, No. 16-cv-3605, 2017 WL 2964817, at *4 (S.D.N.Y. July 11, 2017) (applying compulsion, joint action, and public function tests, and finding public access channel operator was not state actor); *Clorite*, 2016 WL 5334521, at *9 (applying *Lebron* and finding private operator of public access channel not state actor); *Griffin v. Public Access Cmty. Television*, No. 10-cv-602, 2010 WL 3815797, at *2-4 (W.D. Tex. Sept. 27, 2010) (applying compulsion, joint action, and public function tests and finding no state action); *Hebrew*, 2010 WL 2944439, at *6 (same); *Morrone*, 363 F. Supp. 2d at 558 (finding private operator of public access channel not a state actor without analysis); *Huston v. Time Warner Entm't*, No. 03-cv-0633, slip op. (N.D.N.Y. Mar. 25, 2004), ECF No. 31 (same), *aff'd on other grounds*, 127 Fed. Appx. 528 (2d Cir. Mar. 31, 2005); *Glendora*, 1996 WL 721077, at *3 (applying joint action and public function tests and finding no state action); *Glendora v. Marshall*, 947 F. Supp. 707, 712 (S.D.N.Y. 1996) (same); *Glendora*, 893 F. Supp. at 270 (same).

Other district courts have reached the opposite conclusion—that private operators of public access channels *are* state actors. *See, e.g., Demarest*, 188 F. Supp. 2d at 90-91 (applying *Lebron* and finding operator of public access channel a state actor); *Jersawitz v. People TV*, 71 F. Supp. 2d 1330, 1337-1338 (N.D. Ga. 1999) (applying *Lebron* and holding that a private operator of public access channel was government agency); *see also Egli v. Strimel*, No. 14-cv-4204, 2016 WL 1392254, at *2 (E.D. Pa. Apr. 8, 2016) (*Egli II*) (applying *Lebron* and finding an issue of fact as to whether private, nonprofit operator of public access channel was a state actor).

Still other district courts have refused to make the threshold "state action" determination until they had a more complete factual record. *See Egli I*, 2015 WL 5093048, at *3 (declining to engage in state action analysis at pleadings stage); *Egli II*, 2016 WL 1392254, at *2 (subsequent proceeding to *Egli I*, finding issue of material fact regarding state action given evidence that township had "complete control over the content, scheduling, and administration of the" public access channels); *Glendora*, 916 F. Supp. at 1341 (allegations insufficient to determine state action on motion for preliminary injunction and reserving decision following discovery).

III. THE DECISION BELOW RAISES ISSUES OF RECURRING AND NATIONWIDE IMPORTANCE

This Court should grant certiorari because the decision below threatens to erode the protections that this Court has put into place for the last half century to ensure that only the rarest of private entities are subject to constitutional scrutiny. While public access channels

are commonplace throughout the country, the issue raised by the decision below is even more important given the current landscape of new and evolving technology, particularly in social media and other communication platforms.

A. The Decision Below Exposes Public Access Channel Operators to the Considerable Expense of Federal Judicial Review and Other Consequences

As a result of the decision below, the rules, policies and actions of a private operator of a public access channel will now be subject to the expense and distraction of recurring federal judicial review. This is concerning for several reasons. In addition to the costly nature of defending claims in federal court, constitutional claims carry with them the threat of attorneys' fees for the prevailing party. 42 U.S.C. § 1988(b). Nonprofits such as MNN are particularly vulnerable to litigants seeking to use federal constitutional claims as leverage to force settlements or concessions where none are warranted.

The New York legislature—which, according to the Majority, put in motion the very statutory scheme that makes MNN a state actor—also devised a completely different recourse for aggrieved producers. The PSC regularly hears claims by allegedly aggrieved producers. Pet. App. 52a. The decision below would allow aggrieved producers and others to circumvent the PSC grievance process and instead rush into federal court to bring constitutional claims against private entities.

The Second Circuit's *per se* rule would also upset the very purpose of public access television, diverting scarce resources from operations to defending potential federal lawsuits and importing new bureaucracies. Operators would likely be forced to defend administrative decisions such as scheduling changes, suspensions for threats of violence, or simply assigning a producer a less-than-ideal time slot.

A number of other collateral consequences may arise out of the decision below that can, individually or collectively, prove exceedingly costly and difficult for nonprofits such as MNN. For example, should MNN be subject to state sunshine and open meetings laws? Will MNN need to add administrators to manage requests under the Freedom of Information Act (5 U.S.C. § 552 *et seq.*) and its state corollaries? While a city, county, or state routinely deal with such consequences, they are of great significance to a private nonprofit company that lacks the necessary infrastructure to address them.

B. The Decision Below Could Dramatically Expand the Definition of State Action and Public Forum

Courts are routinely faced with the state actor conundrum in new contexts. For example, a New York district court recently had to rule on whether part of President Trump's Twitter account is a constitutional public forum. *See Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 17-cv-5205, 2018 WL 2327290, at *5 (S.D.N.Y. May 23, 2018). There, the court held that a portion of the President's Twitter account—*but not Twitter itself*—was a constitutional public forum

because the government controlled the content of the tweets sent from the President's account. *Id.* at *15. *See also Davison v. Plowman*, 247 F. Supp. 3d 767, 776 (E.D. Va. 2017) (holding that a municipal county's Facebook page was a "limited public forum").

Twitter, YouTube, Facebook, and Instagram are all popular social media venues used for sharing political opinion. And, though they are all privately owned and operated, they are subject to numerous federal and state laws, exist because the government created the Internet, and are utilized by all levels of government. But applying the traditional state actor analysis should still lead to the conclusion that these entities and their employees are not state actors. *See, e.g.*, *Prager Univ. v. Google LLC*, No. 17-cv-06064, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018) (dismissing First Amendment claims against YouTube and Google); *Shulman v. Facebook.com*, No. 17-cv-00764, 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) (Facebook not constitutional state actor). Under the new test announced by the Majority, it is not so clear that these entities are divorced from state action.

Private radio stations are another example. Although National Public Radio ("NPR") was created by virtue of the Public Broadcasting Act of 1967 (47 U.S.C. § 396 *et seq.*), most "public" radio is not public at all—stations are private, often non-profit, entities that support their mission through listener and corporate donations.[7] The Majority's decision calls into question whether these private entities

7. *See* American Public Media, *Organizational Structure*, https://www.americanpublicmedia.org/about/org-structure (last visited June 20, 2018).

should be treated as state actors either because they were created by act of government, are heavily regulated, or bear more than a passing resemblance to state-owned broadcasters. *See Abu-Jamal v. Nat'l Pub. Radio*, No. 96-cv-0594, 1997 WL 527349, at *4 (D.D.C. Aug. 21, 1997), *aff'd*, 159 F.3d 635 (D.C. Cir. 1998) ("NPR ... is not a government instrumentality, and is not a state actor for First Amendment purposes.").

Granting certiorari is necessary to resolve a recurring issue not just for operators of public access channels but also for those who own and operate private companies involved in new and changing media platforms.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 21, 2018

APPENDIX

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED FEBRUARY 9, 2018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 16-4155

DEEDEE HALLECK,
JESUS PAPOLETO MELENDEZ,

Plaintiffs-Appellants,

v.

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE, CITY OF NEW YORK,

Defendants-Appellees.

June 19, 2017, Argued
February 9, 2018, Decided

Before: NEWMAN, JACOBS, and LOHIER, *Circuit Judges.*

Appeal from the December 14, 2016, judgment of the District Court for the Southern District of New York, (William H. Pauley III, District Judge), dismissing for failure to state a valid claim allegations of First Amendment violations against the City of New York and

a private corporation and its employees operating a public access television channel. See *Halleck v. City of New York*, 224 F. Supp. 3d 238 (S.D.N.Y. 2016). The Plaintiffs-Appellants contend that a public access channel is a public forum.

Affirmed as to the City of New York, reversed as to Manhattan Community Access Corporation and its employees, and remanded.

Judge Lohier concurs with a separate opinion; Judge Jacobs concurs in part and dissents in part with a separate opinion.

JON O. NEWMAN, *Circuit Judge*:

This appeal presents the issue of whether the First Amendment's limitation on governmental restriction of free speech applies, in the circumstances of this case, to the operators of public access television channels. More specifically, the main issue is whether the Amendment applies to employees of a non-profit corporation, designated by the Manhattan Borough President to oversee public access TV channels, who are alleged to have suspended individuals involved in public access TV programming from using the corporation's facilities. This issue arises on an appeal by Deedee Halleck and Jesus Papoleto Melendez from the December 14, 2016, judgment of the District Court for the Southern District of New York (William H. Pauley III, District Judge). *See Halleck v. City of New York*, 224 F. Supp. 3d 238 (S.D.N.Y. 2016). The judgment dismissed, for failure to state a valid claim,

the Plaintiffs-Appellants' complaint against Manhattan Community Access Corporation ("MCAC"); three of its employees, Daniel Coughlin, Jeanette Santiago, and Cory Bryce; and the City of New York (the "City"). The complaint alleged violations of 42 U.S.C. § 1983; Article 1, Section 8 of the New York State Constitution; and Article 7 of the New York State Public Officers Law.

We conclude that the public access TV channels in Manhattan are public forums and that MCAC's employees were sufficiently alleged to be state actors taking action barred by the First Amendment to prevent dismissal of the claims against MCAC and its employees, but not against the City. We therefore affirm in part, reverse in part, and remand.

BACKGROUND

Statutory, regulatory, and contractual framework. The Cable Communications Policy Act of 1984 (the "Act") has special provisions for two categories of cable TV channels—leased channels and public, educational, or governmental channels. "[T]o promote competition in the delivery of diverse sources of video programming," 47 U.S.C. § 532(a), the Act requires cable system operators to "designate channel capacity for commercial use by persons unaffiliated with the operator," *id.* § 532(b)(1). These are generally called "leased channels." *See Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 734, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996) ("*Denver Area*").

The Act also authorizes cable franchising authorities to require for franchise renewal "that channel capacity be designated for public, educational, or governmental use," 47 U.S.C. § 531(b), and to require "adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support," *id.* § 541(a)(4)(B). These are what Justice Kennedy's opinion in *Denver Area* called "PEG access channels." 518 U.S. at 781. Public access channels, the P in PEG, are "available at low or no cost to members of the public, often on a first-come, first-served basis." *Id.* at 791.[1]

In New York, a Public Service Commission regulation requires a cable TV system with a capacity for 36 or more channels to "designate . . . at least one full-time activated channel for public access use." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(b)(1). The regulation defines a public access channel as a channel "designated for noncommercial use by the public on a first-come, first-served, nondiscriminatory basis." *Id.* § 895.4(a)(1).

The City awarded cable franchises for Manhattan to Time Warner Entertainment Company, L.P. ("Time Warner"). First Amended Complaint ("FAC") ¶ 30. The

1. Justice Kennedy further explained, "Under many franchises, educational channels are controlled by local school systems, which use them to provide school information and educational programs. Governmental access channels are committed by the cable franchise to the local municipal government, which uses them to distribute information to constituents on public affairs." *Denver Area*, 518 U.S. at 790.

franchise agreement for Northern Manhattan provides that Time Warner will provide four public access channels. The agreement recites that the Manhattan Borough President has designated a not-for-profit, nonmembership corporation to serve as the Community Access Organization ("CAO") for the borough "under whose jurisdiction the Public Access Channels shall be placed for purposes of Article 8 of this Agreement," which applies to public, educational, and governmental services. That CAO is the Defendant-Appellee MCAC, known as Manhattan Neighborhood Network ("MNN").

Allegations of First Amendment violations. Plaintiffs-Appellants Deedee Halleck and Jesus Papoleto Melendez alleged that MNN, three of its employees, and the City violated their First Amendment rights by suspending them from using MNN's public access channels because of disapproval of the content of a TV program that Halleck had submitted to MNN's programming department for airing on MNN's public access channel. This claim is based on the following factual allegations, which we accept as true for purposes of reviewing, *de novo*, the dismissal of the complaint.

Both Halleck and Melendez have been involved in producing public access programming in Manhattan. In July 2012, MNN held an event to mark the opening of the El Barrio Firehouse Community Media Center ("El Barrio Firehouse"). Halleck and Melendez stood outside, interviewing invitees. In August or September 2012, Halleck submitted to MNN for airing on MNN's public access channels a video entitled "The 1% Visits

the Barrio," based on video footage taken at the El Barrio Firehouse opening (the "1% video"). The 1% video presented the Plaintiffs' view that MNN was "more interested in pleasing 'the 1%' than addressing the community programming needs of those living in East Harlem." FAC ¶ 83. MNN aired the 1% video on public access channels in October 2012.

In a letter dated October 11, 2012, defendant Jeanette Santiago, MNN's Programming Director, informed Halleck that she was suspended for three months from airing programs over MNN's public access channels. Santiago stated that the 1% video violated MNN's program content restrictions barring "participation in harassment or aggravated threat toward staff and/or other producers." FAC ¶ 86.[2] The Plaintiffs allege that Halleck was suspended because the 1% video "presented the view that MNN was more interested in pleasing 'the 1%' than addressing the community programming needs of those living in East Harlem." FAC ¶ 97.

In a letter dated August 1, 2013, defendant Daniel Coughlin, MNN's executive director, suspended Melendez indefinitely from all MNN services and facilities. Coughlin claimed that at an encounter in July 2013 Melendez had "pushed him over." FAC ¶ 106. The Plaintiffs allege

2. The letter quoted Melendez's statement in the 1% video that "People of color work in this building and I have to wait until people get fired, they retire or someone kills them so that I can come and have access to the facility here." FAC ¶ 87. Santiago said the letter "incited violence and harassment towards staff and was in direct violation of MNN's 'zero tolerance on harassment.'"

that Melendez was suspended because of the views he expressed in the 1% video. In a letter dated August 9, 2013, Coughlin suspended Halleck for one year from all MNN services and facilities, claiming receipt of complaints about the 1% video. Although Halleck's suspension has ended, she cannot air the 1% video on any public access channels in Manhattan. By letter dated April 24, 2015, defendant Cory Brice,[3] MNN's manager of production and facilitation, confirmed Melendez's indefinite suspension.

District Court opinion. With respect to the Plaintiffs' First Amendment claim against MNN, the District Court recognized that the claim, pursued under 42 U.S.C. § 1983, was viable only if MNN was a state actor because the First Amendment limits only governmental action. Acknowledging that MNN was a private entity, the Court first considered whether its actions might be subject to the First Amendment because "'[a]ctions of private entities can sometimes be regarded as governmental action for constitutional purposes.'" *Halleck*, 224 F. Supp. 3d at 243 (quoting *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995)). The District Court noted that in *Lebron* the Supreme Court had stated that "'where . . . the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.'" *Id.* (quoting *Lebron*, 513 U.S. at 399). The District Court deemed *Lebron*

3. The name was misspelled "Bryce" in the FAC.

inapplicable because the Manhattan Borough President had authority to appoint only two of the thirteen members of MNN's board. *See id.*

The District Court then considered whether the First Amendment might apply to MNN's actions on the theory that a public access channel is a public forum. *See Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (recognizing traditional and designated public forums). Judge Pauley noted that justices of the Supreme Court have taken different positions on the public forum issue, *see Halleck*, 224 F. Supp. 3d at 245 (citing opinions of Justices Kennedy and Thomas with respect to public access channels and Justice Breyer with respect to leased channels), as have courts of appeals and district courts within the Second Circuit, *see id.* at 244-46.

Deeming the issue a "close call," *id.* at 246, Judge Pauley ruled that a public access channel is not a public forum for two reasons. First, he observed that "'[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty.'" *Id.* at 246 (citing *Glendora v. Cablevision Systems Corp.*, 893 F. Supp. 264, 269 (S.D.N.Y. 1995)). Second, he read our Court's decision in *Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256 (2d Cir. 1999), as "implicitly reject[ing] Plaintiffs' argument that public access channels are designated public fora because they are 'required by government fiat.'" *Halleck*, 224 F. Supp. 3d. at 247 (quoting Plaintiffs' opposition to motion

to dismiss at 12). The District Court dismissed the First Amendment claim against MNN (and presumably its employees) for lack of state action.

With respect to the Plaintiffs' First Amendment claim against the City, the District Court noted that "'Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.'" *Id.* at 242 (quoting *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). In the absence of such a policy, the Court dismissed the claim against the City because the Plaintiffs had alleged only that the City was "'aware tha[t] MNN has censored plaintiffs' and other cable access programming.'" *Id.* at 243 (quoting FAC ¶ 126).

With the federal claims dismissed, the District Court declined to exercise pendent jurisdiction over the state law claims and granted the motion to dismiss the complaint.

DISCUSSION

I. First Amendment Claim Against MNN and Its Employees

Because MNN is a private corporation, the viability of the Plaintiffs' First Amendment claim against it and its employees depends on whether MNN's actions can be deemed state action. A nominally private entity can be a state actor in several different circumstances. *See Brentwood Academy v. Tennessee Secondary School*

Athletic Assn., 531 U.S. 288, 296, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001) (outlining seven examples of circumstances in which a private entity may be deemed a state actor).

Our consideration of whether the public access channels in the pending appeal are public forums must begin with the Supreme Court's decision in *Denver Area*, a case that generated six opinions spanning 112 pages of the United States Reports. The case concerned the constitutionality of three provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), Pub. L. No. 102-385, §§ 10(a), 10(b), and 10(c), 106 Stat. 1460, 1486 (codified at 47 U.S.C. §§ 532(h), 532(j), and note following § 531). Sections 10(a) and 10(b) apply to leased channels.[4] Section 10(c) applies to public access channels, with which we are concerned on this appeal. It requires the Federal Communications Commission to promulgate regulations that permit a cable operator to prohibit "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." 1992 Act § 10(c).

The Supreme Court ruled section 10(a) constitutional, and sections 10(b) and 10(c) unconstitutional. *See Denver Area*, 518 U.S. at 733, 768. With respect to section 10(c), the only provision applicable to public access channels, the

4. Section 10(a) permits a cable operator to prohibit "patently offensive" programming. 1992 Act § 10(a). Section 10(b) requires the Federal Communications Commission to promulgate regulations that require cable operators to segregate "indecent" programming, place it on a single channel, and block access unless a viewer requests access. *Id.* § 10(b).

vote to invalidate was five to four with the Justices issuing four opinions, summarized in the margin.[5]

Pertinent to the pending appeal, five Justices expressed differing views on whether public access channels were public forums. Justice Kennedy, with whom Justice Ginsburg concurred, said, "A public access channel is a public forum." *Id.* at 783. He pointed out, "'They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas.'" *Id.* at 791-92 (quoting H.R. Rep. No. 98-934, at 30 (1984)). He further explained, "It is important to understand that public access channels

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5. Justice Breyer, writing for himself and Justices Stevens and Souter, voted to invalidate section 10(c) because "the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end." *Denver Area*, 518 U.S. at 766.

Justice Kennedy, writing for himself and Justice Ginsburg, acknowledged that Congress has "a compelling interest in protecting children from indecent speech," but voted to invalidate section 10(c) because it was not "narrowly tailored to serve a compelling interest." *Id.* at 805-06.

Justice O'Connor voted to uphold section 10(c) on the ground that it was a "permissive," sufficiently "tailored" provision that served "the well-established compelling interest of protecting children from exposure to indecent material." *Id.* at 779-80.

Justice Thomas, writing for himself and Chief Justice Rehnquist and Justice Scalia, voted to uphold section 10(c) on the ground that the public access programmers could not challenge a scheme that restricted the free speech rights of cable operators. *Id.* at 823.

are public fora created by local or state governments in the cable franchise," *id.* at 792, and added, "[W]hen a local government contracts to use private property for public expressive activity, it creates a public forum," *id.* at 794.

On the other hand, Justice Thomas, with whom Chief Justice Rehnquist and Justice Scalia concurred, said that a public access channel is not a public forum. His reason: a public access channel is privately owned. *See id.* at 826-31. That point precipitated an exchange between Justices Thomas and Kennedy as to whether the relationship between the governmental franchising authority and the operator of the cable system renders nominally private property, a public access channel, a designated public forum.

Justice Thomas acknowledged the Supreme Court's statement that "a public forum may consist of 'private property dedicated to public use.'" *Id.* at 827 (quoting *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 801, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)). But, he pointed out, the quoted statement "refers to the common practice of formally dedicating land for streets and parks when subdividing real estate for developments." *Id.* "Such dedications," he continued, "at least create enforceable public easements in the dedicated land." *Id.* Thus, he concluded, "To the extent that those easements create a property interest in the underlying land, it is that government-owned property interest that may be designated as a public forum." *Id.* at 828.

In reply, Justice Kennedy explained, "[I]n return for granting cable operators easements to use public rights-of-way for their cable lines, local governments have bargained for a right to use cable lines for public access channels. . . . [N]o particular formalities are necessary to create an easement. . . . [W]hen a local government contracts to use private property for public expressive activity, it creates a public forum." *Id.* at 793-94.

In Part II of *Denver Area*, Justice Breyer, with whom Justices Stevens, O'Connor, and Souter concurred, explicitly declined to express a view as to whether a public access channel is a public forum. *See id.* at 742 ("We therefore think it premature to answer the broad questions that Justices Kennedy and Thomas raise in their efforts to find a definitive analogy, deciding, for example, the extent to which private property can be designated a public forum[.]").[6]

In view of the statutory, regulatory, and contractual framework under which this case arises and the purpose for which Congress authorized public access channels, we are persuaded by the conclusion reached by Justices Kennedy and Ginsburg. A public access channel is the electronic version of the public square. Without determining whether a public access channel is necessarily a public forum simply by virtue of its function in providing an equivalent of the public square, we conclude that where, as here, federal law authorizes setting aside channels for public

6. As to leased channels, Justice Breyer said, "[I]t is unnecessary, indeed, unwise, for us definitively to decide whether or how to apply the public forum doctrine to [them]." 518 U.S. at 749.

access to be "the electronic marketplace of ideas," state regulation requires cable operators to provide at least one public access channel, a municipal contract requires a cable operator to provide four such channels, and a municipal official has designated a private corporation to run those channels, those channels are public forums.[7]

Because facilities or locations deemed to be public forums are usually operated by governments, determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to First Amendment limitations. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 265-68, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981) (regulation issued by state university Board of Curators governing use of university buildings and grounds); *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 169, 176, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976) (order issued by state employment commission governing employee speech at public school board meeting). In the pending case, however, the facilities deemed to be public forums are public access channels operated by a private non-profit corporation. In this situation, whether the First Amendment applies to the individuals who have taken the challenged actions in a public forum depends on whether they have a sufficient connection to governmental authority to be deemed state actors. That connection is established in this case by the fact that the Manhattan Borough President designated

7. We note that a State regulation permits the cable operator to prohibit obscenity or other content unprotected by the First Amendment. *See* N.Y. Com. Codes R. & Regs. tit. 16, § 895.4(c)(8).

MNN to run the public access channels. The employees of MNN are not interlopers in a public forum; they are exercising precisely the authority to administer such a forum conferred on them by a senior municipal official. Whether they have taken the actions alleged and, if so, whether they have thereby violated First Amendment limitations are matters that remain to be determined in further proceedings.

The non-municipal defendants invoke our decision in *Loce v. Time Warner Entertainment Advance/ Newhouse Partnership*, 191 F.3d 256 (2d Cir. 1999), to resist application of First Amendment restrictions to their alleged conduct. However, *Loce* neither ruled nor implied that a public access channel was not a public forum. *Loce* concerned leased channels, not public access channels. The different purposes for which Congress required leased channels and authorized franchising authorities to require public access channels underscore why the latter are public forums. Congress required leased channels in order "to promote competition" with commercial channels "in the delivery of diverse sources of video programming." 47 U.S.C. § 532(a). The explicit purpose of public access channels was to give the public an enhanced opportunity to express its views. As the relevant committee said, public access channels are "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." H.R. Rep. No. 98-934, at 30 (1984). Leased channels concern economics. Public access channels concern democracy.

We note that the defendant in *Loce* was Time Warner, the operator of a cable system carrying the leased channel, not, as in this case, the entity operating the public access channels. And, we noted in *Loce*, "The record offer[ed] no evidence that Time Warner and the municipal franchising authorities jointly administer leased access channels." *Id.* at 267. Although Time Warner, the cable system operator, and the City do not jointly administer the public access channels in the pending case, MNN administers those channels under explicit authorization from a senior municipal official.

We acknowledge that other courts have not considered public access channels to be public forums. In *Alliance for Community Media v. FCC*, 56 F.3d 105, 312 U.S. App. D.C. 141 (D.C. Cir. 1995) (*in banc*), eight members of the eleven member *in banc* court found "no state action . . . because that essential element cannot be supplied by treating access channels as public forums." *Id.* at 123. As pointed out above, when that decision was reviewed and reversed in part by the Supreme Court in *Denver Area*, two Justices (Kennedy and Ginsburg) explicitly disagreed with the D.C. Circuit's view about public access channels and four Justices (Stevens, O'Connor, Souter, and Breyer) found it unnecessary to consider that view.[8]

Several District Courts have considered whether a public access channel is a public forum and have reached conflicting results. *Compare Egli v. Strimel*, No. 14-cv-

8. In *Wilcher v. City of Akron*, 498 F.3d 516 (6th Cir. 2007), the Sixth Circuit, without deciding whether a public access channel might be deemed a public forum, ruled that the operator of a cable system carrying a public access channel was not a state actor.

6204, 2015 U.S. Dist. LEXIS 114312, 2015 WL 5093048, at *4 (E.D. Pa. Aug. 28, 2015) (public forum); *Brennan v. Williams Paterson College*, 34 F. Supp. 3d 416, 428 (D.N.J. 2014) (public forum plausibly alleged); *Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 50 (D. Me. 2002) (recognizing applicability of public forum analysis); *Jersawitz v. People TV*, 71 F. Supp. 2d 1330, 1341 (N.D. Ga. 1999) (public forum), *with Morrone v. CSC Holdings Corp.*, 363 F. Supp. 2d 552, 558 (E.D.N.Y. 2005) (not public forum); *Glendora v. Tele-Communications, Inc.*, No. 96-cv-4270 (BSJ), 1996 U.S. Dist. LEXIS 18650, 1996 WL 721077, at *3 (S.D.N.Y. Dec. 13, 1996) (same); *Glendora v. Cablevision Systems Corp.*, 893 F. Supp. 264, 270 (S.D.N.Y. 1995) (same); *see also Glendora v. Hostetter*, 916 F. Supp. 1339, 1341 (S.D.N.Y. 1996) (noting that two of the decisions cited above had ruled that public access channels are not public forums).

With all respect to those courts that have expressed a view different from ours, we agree with the view expressed by Justices Kennedy and Ginsburg in *Denver Area*. Public access channels, authorized by Congress to be "the video equivalent of the speaker's soapbox" and operating under the municipal authority given to MNN in this case, are public forums, and, in the circumstances of this case, MNN and its employees are subject to First Amendment restrictions.

II. Municipal Liability

We agree with the District Court that the complaint does not allege actions by the City that suffice to make it liable for the Plaintiffs' federal claims. Municipal liability

under section 1983 arises when the challenged action was taken pursuant to a municipal policy. *See Monell*, 436 U.S. at 691-95. No such policy has been alleged in this case, much less the required "direct causal link between a municipal policy or custom and the alleged constitutional deprivation," *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989).

CONCLUSION

The judgment of the District Court is reversed as to MNN and its employees, affirmed as to the City, and remanded for further proceedings.

LOHIER, *Circuit Judge, concurring*:

I fully agree with the majority opinion. I write separately to add only that in the specific circumstances of this case we might also rely on the public function test to conclude that MNN and its employees are state actors subject to First Amendment restrictions when they regulate the public's use of the public access channels at issue here. "Under the public function test, state action may be found in situations where an activity that traditionally has been the exclusive, or near exclusive, function of the State has been contracted out to a private entity." *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 264-65 (2d Cir. 2014) (quotation marks omitted). A private entity's regulation of speech in a public forum is a public function when the State has expressly delegated the regulatory function to that entity. *See, e.g.*, *Lee v. Katz*, 276 F.3d 550, 555-56 (9th Cir. 2002).

The dissent recognizes this established doctrine, Partial Dissent at 4-5, but maintains that MNN's public access channels are not public forums because they are merely "entertainment facilit[ies]" that, as such, do not involve a function "traditionally exclusively reserved to the State," *id.* at 5 (quoting *Halleck v. City of New York*, 224 F. Supp. 3d 238, 246 (S.D.N.Y. 2016)). Other courts have this view. *See, e.g.*, *Wilcher v. City of Akron*, 498 F.3d 516, 519 (6th Cir. 2007) ("TV service is not a traditional service of local government.").

But the distinction between entertainment and public speech is perilous as a matter of constitutional law and in this case unfounded as a matter of fact.

"The Free Speech Clause exists principally to protect discourse on public matters, but ... it is difficult to distinguish politics from entertainment, and dangerous to try." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) (Scalia, J.). "What is one man's amusement, teaches another's doctrine." *Id.* (quoting *Winters v. New York*, 333 U.S. 507, 510, 68 S. Ct. 665, 92 L. Ed. 840 (1948)). Depending on one's point of view, political debates as far back as Lincoln and Douglas, rock concerts in Central Park, *see Ward v. Rock Against Racism*, 491 U.S. 781, 790-91, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989), and the comedian's late night television routine, *see FCC v. Pacifica Found.*, 438 U.S. 726, 744-47, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978), might count as entertainment, or politics, or something in between. So simply dismissing a public access channel as an "entertainment facility" fails to remove it from the category of a public forum.

One look at MNN's website reveals that MNN's public access channels largely offer "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 791, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quotation marks omitted). The programming relates to political advocacy, cultural and community affairs, New York elections, religion—in a word, democracy. *See* www.mnn.org/schedule (last visited February 1, 2018); Majority Op. at 18; *23-34 94th St. Grocery Corp. v. New York City Bd. of Health*, 685 F.3d 174, 183 n.7 (2d Cir. 2012) (taking judicial notice of a website).

Appendix A

As the majority suggests without saying it outright, New York City delegated to MNN the traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels. For this reason, on this record, I agree that MNN and its employees are subject to First Amendment restrictions.

Appendix A

JACOBS, *Judge*, concurring in part and dissenting in part:

I join the opinion of the Court in affirming the dismissal of the claims against the municipal defendants: the complaint fails to allege actions by the city that amount to "municipal policy." Op. at 20; *Monell*, 436 U.S. at 691-95. I respectfully dissent because I would also affirm the dismissal of the claims against Manhattan Community Action Corporation, otherwise known as Manhattan Neighborhood Network ("MNN"). The controlling precedent is *Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256 (2d Cir. 1999) (Kearse, J.), which ruled that a private corporation operating a television station under a city franchise agreement and in accordance with federal statute is not a state actor. The opinion of the Court wholly relies on a distinction between the leased access channel at issue in *Loce* and the public access channel at issue in this case. That tenuous distinction is unconvincing and in any event unsupported by our First Amendment jurisprudence.

* * *

"[T]he United States Constitution regulates only the Government, not private parties." *United States v. Int'l Bhd. Of Teamsters*, 941 F.2d 1292, 1295 (2d Cir. 1991). "A plaintiff pressing a claim of violation of his constitutional rights" under 42 U.S.C. § 1983 is therefore "required to show state action." *Tancredi v. Metro. Life Ins. Co.*, 316 F.3d 308, 312 (2d Cir. 2003).

Appendix A

MNN is a private corporation. A private entity may become a state actor only under the following limited conditions:

> "(1) the entity acts pursuant to the 'coercive power' of the state or is 'controlled' by the state ('the compulsion test'); (2) when the state provides 'significant encouragement' to the entity, the entity is a 'willful participant in joint activity with the state,' or the entity's functions are "entwined" with state policies ('the joint action test' or 'close nexus test'); or (3) when the entity "has been delegated a public function by the state," ('the public function test')."

Sybalski v. Independent Group Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008)(citing *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001)).

* * *

MNN cannot be cast as a state actor by application of the tests for compulsion or joint action.

Compulsion. "Action taken by private entities with the mere approval or acquiescence of the State is not state action." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999). MNN's designation in a franchise agreement and regulation by a municipal commission do not in and of themselves demonstrate that MNN is "controlled" or "compelled"

by the state. *See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 543-44, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (1987) (finding that granting of a corporate charter by Congress does not create state action because "[e]ven extensive regulation by the government does not transform the actions of the regulated entity into those of the government."). To allege compulsion, a plaintiff must show that the government compelled the particular activity that allegedly caused the constitutional injury. *See Sybalski*, 546 F.3d at 257-58. The amended complaint has no allegation of government involvement in the appellants' suspensions from which state action can be inferred.

Joint Action. The "decisive factor" in entwinement analysis is the "amount of control [the municipality] could potentially exercise over the [private corporation's] 'internal management decisions.'" *Grogan*, 768 F.3d at 269 (internal citations omitted). A corporation thus becomes "part of the Government for the purposes of the First Amendment" when the Government retains "permanent authority to appoint a majority of the directors of that corporation." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1999). The city's power of appointment is limited to two of MNN's thirteen board members, and is clearly insufficient to support a finding of state action. *See Grogan*, 768 F.3d at 269. Nor do the statutory guidelines for cable access or the borough's oversight activities establish joint action between the Government and MNN. "[A] regulatory agency's performance of routine oversight functions to ensure that a company's conduct complies with state law

does not so entwine the agency in corporate management as to constitute state action." *Tancredi*, 316 F.3d at 313; *see also Sybalski*, 546 F.3d at 258-59.

* * *

This leaves the "public function" test as the only remaining vehicle by which MNN's activities may be considered state action. Judge Lohier's concurring opinion undertakes to establish state action under the "public function" test.

A private entity performs a "public function" when its specific conduct at issue in the complaint has historically been "an exclusive prerogative of the sovereign." *Grogan v. Blooming Grove Volunteer Ambulance Corp.*, 768 F.3d 259, 265-67 (2d Cir. 2014) (internal quotation marks omitted). It is argued that one such "traditional and exclusive public function" is "the regulation of free speech in a public forum." *Halleck*, 224 F. Supp. 3d at 244; *cf. Hotel Emps. & Restaurant Emps. Union, Local 100 v. N.Y.C. Dep't of Parks & Recreation*, 311 F.3d 534, 544 (2d Cir. 2002). That presents the question whether a public-access channel is a public forum. Contrary to the view expressed in Judge Lohier's opinion, it is not. That is because, as Judge Pauley observed, "[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty." *Id.* at 246; *see also Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 740, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996) (declining to "import" public forum doctrine into the analysis of

speech on cable access channels). And it is fortunate for our liberty that it is not at all a near-exclusive function of the state to provide the forums for public expression, politics, information, or entertainment.

Consideration of MNN's status as a state actor therefore requires an examination of its function, guided by these principles. Instead, the opinion of the Court proceeds as follows: private property leased by the Government for public expressive activity creates a public forum, Op. at 16; a facility deemed to be a public forum is usually operated by Government, *id.*; action taken at a facility determined to be a public forum usually is state action, *id.* at 17; the First Amendment applies to a person acting at such a facility if the person has a sufficient connection to Government authority to constitute state action, *id.*; and here, the Borough President's designation of MNN to administer the public-access station is sufficient. The opinion of the Court thus drops a link: that the private entity (MNN) performs a function that has been the exclusive (or near-exclusive) function of Government.

The appellants contend that MNN is a "state actor" under the public function test because a public access channel is a public forum. This approach is inconsistent with our *Loce* precedent that administering leased access channels does not constitute state action. The holding in *Loce* applies with (at least) equal analytical force to the administration of public-access channels:

> The fact that federal law requires a cable operator to maintain leased access channels and the fact that the cable franchise is granted by a local government are insufficient, either singly or in combination, to characterize the cable operator's conduct of its business as state action. Nor does it suffice that cable operators, in their management of leased access channels, are subject to statutory and regulatory limitations.

191 F.3d at 267. The salient distinction between leased access and public-access channels is that federal law requires leased-access channels and merely authorizes public-access channels, 47 U.S.C. §§ 531(a), 532(b)(1). So, if anything, the *Loce* analysis applies to public-access channels *a fortiori*.[1]

The opinion of the Court distinguishes *Loce* largely on the basis that there is a fee for leased access whereas public-access is free. That seems to be the whole of it: "Leased channels concern economics. Public access channels concern democracy." Op. at 18; *see also* Concurring Op. at 3. But not every well-turned phrase is good law. The grant of access to facilities at no cost

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1. Judge Lohier's observation that public speech blends into entertainment is valid, and increasingly so. I do not suggest otherwise. Our point of respectful disagreement is whether, under the public function test, the administration of a cable access channel (whatever its offerings) is a traditional prerogative of sovereignty. The balance of courts hold that it is not; and the Second Circuit in *Loce* is one of them.

by non-commercial entities does not transform property into a public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). Nor does a free, public television broadcast constitute a public forum, even if it is directed by statute to serve the "public interest." *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

We have not expressly applied *Loce* to the administration of public-access channels; but the Sixth Circuit has. In *Wilcher v. City of Akron*, 498 F.3d 516, 519-21 (6th Cir. 2007), that court ruled that there was no state action, relying in part on *Loce*. While *Wilcher* did not discuss public forum doctrine, as the concurring opinion concedes, Concurring Op. at 1-2, its ruling that the administration of public access channels was not a public function is an implicit rejection of the theory advanced by Halleck and the opinion of the court. 498 F.3d at 519.

As the Sixth Circuit concluded, the logic of *Loce* applies with equal force to public-access programming. Cable operators are equally obligated to provide both "forums": federal law requires them to set aside a portion of their capacity for leased access, 47 U.S.C. § 532(b)(1), and permits franchising authorities to require (as the relevant one does) a similar set-aside for public access, *id.* § 531(a). And in both instances the operators are prohibited by law from exercising editorial control, *see id.* §§ 532(c)(2), 531(e).

The D.C. Circuit reached the same result in *Alliance for Community Media v. F.C.C. ("ACM")*, 56 F.3d 105, 312 U.S. App. D.C. 141 (D.C. Cir. 1995). Sitting *in banc*, the D.C. Circuit rejected a First Amendment challenge to portions of a federal statute (and its implementing regulations) that permitted cable operators to block certain non-obscene programming on leased-access *and* public-access channels alike. It reasoned in part that a public-access channel is not a public forum. *Id.* at 121, 123 (rejecting the label of "public forum" and holding that cable access channels are not "so dedicated to the public that the First Amendment confers a right to the users to be free from any control by the owner of the cable system"); *see also Hudgens v. NLRB*, 424 U.S. 507, 509, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976) (finding the dedication of private property as a public forum "attenuated," "by no means" constitutionally required, and untenable).

The *in banc* court also held that there was no state action under a compulsion theory because the government did not coerce cable operators to act; rather, the law authorized but did not require the prohibition of "indecent" programming. *Id.* at 116 ("Rather than coerce cable operators, section 10 gives them a choice."), 118 (rejecting that mere "encouragement" by the Government could amount to state action).

When that case was reversed in part and affirmed in part, *sub nom. Denver Area Educ. Telecommunications Consortium, Inc.*, 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888, the Supreme Court ruled on the constitutionality of the indecent language statute and its implementing

regulations without however deciding the issue presented in our case: whether the administration of leased-access and public-access programming by private entities constitutes state action. The chief concern of the Supreme Court's opinion—the censorship scheme that constituted the Government action at issue, *see* 518 U.S. at 737—is absent here. The D.C. Circuit's *in banc* holding on the status of public access (set out below) was thus left intact:

> Petitioners think that by calling leased access and [public access] channels "public forums" they may avoid the state action problem and invoke the line of First Amendment decisions restricting governmental control of speakers because of the location of their speech. But a "public forum," or even a "nonpublic forum," in First Amendment parlance is government property. It is not, for instance, a bulletin board in a supermarket, devoted to the public's use, or a page in a newspaper reserved for readers to exchange messages, or a privately owned and operated computer network available to all those willing to pay the subscription fee. The Supreme Court uses the "public forum" designation, or lack thereof, to judge "restrictions that the government seeks to place on the use of *its* property." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992) (italics added). State action is present because the property is the government's and the government is doing the restricting.

ACM, 56 F.3d at 121.

In its discussion of *Denver Area*, the opinion of the Court parses and weighs the *dicta* of individual Justices on an issue that the Court did not disturb: the D.C. Circuit's holding that public forum analysis was inapplicable to leased and public cable access channels. On that score, the D.C. Circuit's holding is consonant with the approach to cable access channels in the Second and Sixth Circuits. Moreover, the exchanges among the various Supreme Court opinions adumbrate support for that holding rather than otherwise.

As the opinion of the Court observes, Justice Kennedy, writing for himself and one other Justice, would have held that a public-access channel is a public forum. But three justices would have held that they are not. Four justices in the plurality observed that it was "unnecessary, indeed, unwise" to decide the question; but one reason they adduced for avoiding the question is suggestive: "[I]t is not at all clear that the public forum doctrine should be imported wholesale into the area of common carriage regulation." 518 U.S. at 749. If I made my living construing tea-leaves, I would say that a majority of Justices teetered in favor of the D.C. Circuit's holding. But the insights gleaned from the *dicta* of the various Justices are tentative and indirect, take no account of intervening changes in the Court's composition, and are wholly unreliable as support for any analysis that should decide this appeal.

At least four district judges in this circuit have taken up this issue, three of them in unrelated cases brought by

a single busy *pro se* litigant. In *Glendora v. Cablevision Systems Corp.*, 893 F. Supp. 264 (S.D.N.Y. 1995), Judge Brieant agreed with the *ACM* opinion of the District of Columbia Circuit, *id.* at 270; described the "two general approaches ... to determine whether seemingly private action is in fact state action," *id.* at 269 (quoting *Jensen v. Farrell Lines, Inc.*, 625 F.2d 379, 384 (2d Cir. 1980)); and ruled that neither the "state-function approach" nor the "symbiotic relationship" approach supported state action in the administration of public-access programming. *Id.* at 269-70. In *Glendora v. Hostetter*, 916 F. Supp. 1339 (S.D.N.Y. 1996), then-District Judge Parker denied a preliminary injunction in part because he was "not persuaded at this time that Glendora's constitutional rights are implicated," citing *ACM* and Judge Brieant's opinion on state action, *id.* at 1341. In *Glendora v. Tele-Communications, Inc.*, 1996 U.S. Dist. LEXIS 18650, 1996 WL 721077 (S.D.N.Y. 1996), Judge Jones cited and (in substance) replicated the analysis in Judge Brieant's opinion, and dismissed the complaint. In *Morrone v. CSC Holdings Corp.*, 363 F. Supp. 2d 552 (E.D.N.Y. 2005), Judge Spatt denied a motion for a preliminary injunction in part because "it is clear that" the cable provider "is not a state actor" and "*courts have routinely held that public access channels are not First Amendment 'public forums' for the purposes of state action*," citing *ACM*, Judge Brieant's opinion, and Judge Parker's opinion. *Id.* at 558 (emphasis added).

Loce, which in my view controls, was issued after *ACM* and *Denver Area*, and after the cases of *Glendora*, *Glendora* and *Glendora*.

A ruling in favor of MNN will be consistent with our precedent in *Loce*. The majority conclusion that MNN is a state actor opens a split with the Sixth Circuit; considerably worse, it opens a split with the Second Circuit.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED DECEMBER 13, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

15cv8141

DEEDEE HALLECK, *et ano.*,

Plaintiffs,

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants.

OPINION & ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiffs DeeDee Halleck and Jesus Papoleto Melendez—cable public access producers in Manhattan—assert claims under 42 U.S.C. § 1983 and the First Amendment to the United States Constitution (the "First Amendment Claims"); Article 1, Section 8 of the New York State Constitution (the "State Free Speech Guarantee"); and Article 7 of the New York Public Officers Law (the "Open Meeting Law") against Defendants the City of New York, Manhattan Community Access Corporation (operating as the Manhattan News Network or "MNN"),

Daniel Coughlin, Jeannette Santiago, Cory Brice, and Iris Morales. Plaintiffs seek, among other things, injunctive relief restraining Defendants from interfering with Plaintiffs' exercise of their free speech rights.[1]

Defendants move to dismiss the Amended Complaint. Defendants' motion to dismiss is granted with respect to Plaintiffs' First Amendment Claims. This Court declines to exercise jurisdiction over Plaintiffs' remaining state-law claims—the State Free Speech Guarantee and the Open Meeting Law.

BACKGROUND

The following facts are derived from the Amended Complaint and presumed true for purposes of this motion.

A. Public Access Channels

Cable operators must obtain franchises from local governments to lay the cable or optical fibers needed to reach subscribers. (Am. Compl. ¶¶ 15-16.) As a condition for granting those franchises and their attendant benefits, most local governments require cable operators to dedicate some channels for programming by the public on a first-come, first-serve basis (i.e., "public access

1. Although the Amended Complaint also seeks compensatory and punitive damages, Plaintiffs appear to acknowledge that 47 U.S.C. § 555a(a) precludes the award of monetary damages in actions asserting violations of the Constitution arising from the regulation of cable television. *See, e.g. Coplin v. Fairfield Pub. Access Television Comm.*, 111 F.3d 1395, 1407 (8th Cir. 1997).

channels"). Such channels were encouraged by the Cable Communications Policy Act of 1984 (the "1984 Cable Act"), which established that "franchising authorit[ies] . . . may require as part of a cable operator's proposal for a franchise renewal . . . that channel capacity be designated for public, educational, or governmental use." 47 U.S.C. § 531(b). The 1984 Cable Act further established that "cable operator[s] shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section" except for programs that are "obscene or are otherwise unprotected by the Constitution of the United States." 47 U.S.C. §§ 531(e), 544(d). In New York State, regulations promulgated by the Public Service Commission ("PSC") require that every "franchisee of a cable television system with a channel capacity of 36 or more channels shall designate . . . at least one full-time activated channel for public access use." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(b)(1). Those regulations define public access channels as those "designated for noncommercial use by the public on a first-come, first-served, nondiscriminatory basis." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(a)(1). They prohibit "editorial control" except for "measures as may be authorized by Federal or State law to prohibit obscenity or other content unprotected by the First Amendment of the United States Constitution." 16 N.Y.C.R.R §§ 895.4(c)(8)-(9).

The City of New York awarded cable franchises to Time Warner Entertainment Company, L.P. ("Time Warner"). (Am. Compl. ¶ 30.) Under its franchise agreements, Time Warner must reserve public access

channels to be administered by an "independent, not-for-profit, membership corporation" (known as a community access organization or "CAO") designated by the Manhattan Borough President. (Am. Compl. ¶¶ 31-32.) Under the franchise agreements, "[t]he CAO shall maintain reasonable rules and regulations to provide for open access to Public Access Channel time, facilities, equipment, supplies, and training on a non-discriminatory basis to the extent required by applicable law." (Am. Compl. ¶ 33.)

The Manhattan Borough President designated MNN to administer Manhattan's public access channels. (Am. Compl. ¶ 34.) MNN's stated mission is to "ensure the ability of Manhattan residents to exercise their First Amendment rights through moving image media to create opportunities for communication, education, artistic expression and other non-commercial uses of video facilities on an open and equitable basis." (Am. Compl. ¶ 37.)[2] Coughlin is MNN's Executive Director, Santiago is MNN's Programming Director, and Brice is MNN's Manager of Production and Facilitation. (Am. Compl. ¶¶ 11-14.) MNN maintains a facility in East Harlem known as MNN El Barrio. (Am. Compl. ¶ 38.) The Manhattan Borough President chooses two of MNN's thirteen-member Board of Directors. (Am. Compl. ¶ 36.)

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2. Manhattan Neighborhood Network Policies, available at http://www.mnn.org/sites/default/files/mnn_policies_may2015.pdf (last visited December 12, 2016)).

B. Plaintiffs' Suspension from MNN

In December 2011, Halleck and others were denied entry to an MNN board meeting. (Am. Compl. ¶¶ 41-43.) On March 14, 2012, Plaintiffs attended the MNN Board of Directors quarterly meeting pursuant to an invitation from Coughlin. (Am. Compl. ¶ 51.) After Halleck began videotaping the meeting, the MNN board abruptly adjourned. (Am. Compl. ¶ 55.) Shortly thereafter, Defendant Morales spoke with Plaintiff Melendez and, for reasons that are unclear from the Amended Complaint, called him "a traitor." (Am. Compl. ¶ 59.)

On March 23, 2012, Melendez met with Morales regarding MNN's community leadership program. (Am. Compl. ¶ 64.) Morales screamed at him, threw papers and lightly struck him. Hearing the screams, an MNN security guard entered Morales's office and Melendez left. (Am. Compl. ¶¶ 67-68.) In April 2012, Coughlin informed Melendez that Morales had withdrawn the invitation for Melendez to participate in the community leadership program "due to conduct incompatible with the program's team-building and open communications values," such as his "confrontational, disrespectful and loud behavior on March 23." (Am. Compl. ¶¶ 70-71.) Plaintiffs surmise that the real reason for withdrawing the invitation was because Melendez had attended the MNN board meeting, which Halleck videotaped.

In July 2012, MNN held an invitation-only formal ceremony for MNN El Barrio which was attended by many New York City politicians. (Am. Compl. ¶¶ 72-73.)

Appendix B

Although Halleck and Melendez were not invited, they stood outside to video record and interview attendees, including Morales' boyfriend, Joseph Figueroa. When Halleck asked him to comment about public access, Figueroa responded, "Don't f--- with me." (Am. Compl. ¶ 76.) When Melendez responded, "Hey f--- you," Figueroa rushed at him. (Am. Compl. ¶ 77.) Later, Halleck taped Melendez making the following statement:

> You know what's funny? I got to wait for my people to stop working in this building so that I can gain access to it. Do you understand what I'm saying? Our people, our people, people of color, are in control of this building and I have to wait until they are fired, or they retire, or someone kills them so that I can come and have access to the facility here. Because I am being locked out by people of color. There's irony for you.

(Am. Compl. ¶ 81.) In August or September 2012, Halleck submitted her July 2012 footage for broadcast as a program titled "The 1% Visits the Barrio" to air on MNN. That program presented MNN as an organization more interested in pleasing "the 1%" than the East Harlem community.[3]

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3. The video is available at https://www.youtube.com/watch?v=QEbMTGEQ1xc . The incident with Figueroa begins around the one minute and forty-second mark, and Melendez's statement about people of color begins around the twenty-one minute and twenty-second mark.

Appendix B

In October 2012, Santiago informed Halleck that she was suspended for three months because her program, "The 1% Visits the Barrio," contained footage in which Melendez made statements intended to incite violence and harassed staff in violation of MNN program content restrictions. (Am. Compl. ¶¶ 85-87.) Coughlin denied Halleck's appeal of her three-month suspension. (Am. Compl. ¶ 94.)

In July 2013, Coughlin rebuffed Plaintiffs' inquiries regarding Melendez's status at MNN. (Am. Compl. ¶¶ 98-100.) Then in August 2013, Coughlin suspended Melendez from all MNN services and facilities, asserting that Melendez had threatened and pushed him. (Am. Compl. ¶¶ 104-07.) Referencing the July 2013 encounter, Coughlin also suspended Halleck for one year, and asserted that MNN continued to receive complaints about "The 1% Visits the Barrio." (Am. Compl. ¶¶ 111-13.) While Halleck's suspension has lapsed, she is still not permitted to air "The 1% Visits the Barrio" or any other program with Melendez. Plaintiffs allege that the City is aware of these suspensions. (Am. Compl. ¶ 126.)

LEGAL STANDARD

On a motion to dismiss, the factual allegations in a complaint are accepted as true and all reasonable inferences are drawn in the plaintiff's favor. *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 127 (2d Cir. 2009). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v.*

Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citation omitted); *Ruston v. Town Bd. for Town of Skaneateles*, 610 F.3d 55, 59 (2d Cir. 2010). However, a claim must rest on "factual allegations sufficient to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A pleading offering "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" fails to state a claim. *Iqbal*, 556 U.S. at 678 (citation omitted).

DISCUSSION

"[T]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976). Section 1983 provides that "every person who, under color of any statute, ordinance, regulation, custom, or usage of any state subjects, or causes to be subjected, any . . . person . . . to the deprivation of any [federally protected] rights, privileges, or immunities . . . shall be liable to the party injured . . ."[4]

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4. The State Free Speech Guarantee establishes that "[e]very citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." It "was added [to New York's Constitution] in 1821 as part of the New York Bill of Rights, which was essentially based on the Bill of Rights contained in the United States Constitution." *SHAD Alt. v. Smith Haven Mall*, 66 N.Y.2d 496, 500, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985). The State Free Speech Guarantee is generally "interpreted consistently with the Federal Constitution."

Appendix B

Defendants move to dismiss, arguing that (1) the City took no action concerning Plaintiffs' suspension, and (2) MNN and its employees are not state actors and therefore not liable for any federal civil rights violation.

A. First Amendment Claims Against the City

The Supreme Court has "conclu[ded] that Congress . . . intend[ed] municipalities and other local government units to be included among those persons to whom § 1983 applies." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). However, "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell*, 436 U.S. at 691. "Plaintiffs who seek to impose liability on local governments under § 1983 must prove that action pursuant to official municipal policy caused their injury. Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 563 U.S. 51, 60-61, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011) (internal quotation marks and citations omitted). The "first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989).

Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, 915 F. Supp. 2d 574, 623 n.21 (S.D.N.Y. 2013).

Appendix B

In *Jersawitz v. People TV*, 71 F. Supp. 2d 1330 (N.D. Ga. 1999), the court addressed substantially similar allegations by a public access producer against a municipality. There, the City of Atlanta selected People TV to manage public access channels in accord with its cable franchise agreement. When a public access producer sued Atlanta and People TV after being barred from the facility, the court dismissed claims against Atlanta for the following reasons:

> There is no evidence that the City itself took any action in violation of Plaintiff's constitutional rights under the First Amendment or that it had a policy or custom that permitted People TV or any People TV employee to violate Plaintiff's First Amendment rights. Further, the evidence clearly shows that the City, in the agreement with People TV, required People TV to comply with all applicable federal, state and local laws, rules, regulations, and policies and directed People TV to operate public access on a nondiscriminatory and reasonable basis. The City cannot be held liable for any violation of Plaintiff's First Amendment rights.

Jersawitz, 71 F. Supp. 2d at 1339. *Jersawitz* is consistent with *Monell*'s requirement that a direct link between municipal policy and the alleged constitutional violation exist. And here, the sole allegation against the City is the bald assertion that it was "aware that MNN has censored plaintiffs' and other cable access programming." (Am. Compl. ¶ 126). Thus, as in *Jersawitz*, Plaintiffs' claims

against the City are not legally cognizable under *Monell* and must be dismissed.[5]

B. First Amendment Claims Against MNN

MNN argues that it cannot be held liable for constitutional violations because it is a private entity. "[A]ctions of private entities can sometimes be regarded as governmental action for constitutional purposes." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995). For example, in *Lebron*, the Supreme Court held that "where . . . the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Lebron*, 513 U.S. at 399 (addressing Amtrak). Here, the *Lebron* test is not satisfied because, among other things, the Manhattan Borough President only has the authority to appoint two of MNN's thirteen board members. *Cf. Jersawitz*, 71 F. Supp. 2d at 1338 (holding that a cable public access operator was a state actor where it was paid directly by the municipality, had a majority of its board appointed by the government, and had other obligations to the municipality not present here).

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5. Plaintiffs raise the general principle that a government entity "cannot avoid its constitutional responsibilities by delegating a public function to private parties." *Georgia v. McCollum*, 505 U.S. 42, 53, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). This is true, but that principle does not negate the pleading standard for municipal liability under *Monell*.

In addition,

> the actions of a nominally private entity are attributable to the state when: (1) the entity acts pursuant to the "coercive power" of the state or is "controlled" by the state ("the compulsion test"); (2) when the state provides "significant encouragement" to the entity, the entity is a "willful participant in joint activity with the [s]tate," or the entity's functions are "entwined" with state policies ("the joint action test"); or (3) when the entity "has been delegated a public function by the [s]tate," ("the public function test").

Sybalski v. Indep. Grp. Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001)). Plaintiffs argue that the "public function test" renders MNN a state actor because public access channels are First Amendment "public fora," and the regulation of free speech in a public forum is a traditional and exclusive public function.

Plaintiffs are correct that the regulation of free speech in a public forum is "a traditional and exclusive public function." *Lee v. Katz*, 276 F.3d 550, 555 (9th Cir. 2002) (holding that a private entity charged with regulating speech at a public forum was a "state actor" under the "public function" test when it was regulating such speech); *see also Watchtower Bible & Tract Soc'y of New York, Inc. v. Sagardia De Jesus*, 634 F.3d 3, 10 (1st Cir. 2011) (finding, in the context of a "public function" test analysis, that "regulating access to and controlling

behavior on public streets and property is a classic government function."). Thus, if Plaintiffs have plausibly pled that MNN's administration of public access channels constitutes the administration of public fora, then they have plausibly pled that MNN was a "state actor" under the public function test.

"The classic examples of traditional public fora are streets, sidewalks, and parks, which are properties that have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hotel Employees & Rest. Employees Union, Local 100 of New York, N.Y. & Vicinity, AFL CIO v. City of New York Dep't of Parks and Recreation*, 311 F.3d 534, 544-45 (2d Cir. 2002) (internal quotation marks omitted). In addition to traditional public fora, there are "designated" public fora, *i.e.* "a non-public forum that the government has opened for all types of expressive activity." *Hotel Employees*, 311 F.3d at 545-46. "[R]estrictions on speech in designated public fora are constitutional only if they are content-neutral time, place, and manner restrictions that are (1) necessary to serve a compelling state interest and (2) narrowly drawn to achieve that interest." *Hotel Employees*, 311 F.3d at 545.

The issue of whether public access channels are designated public fora has divided courts. In *All. for Cmty. Media v. F.C.C.*, the D.C. Circuit found that cable public access channels are not public fora:

> [C]able access channels are [not] so dedicated to the public that the First Amendment confers a right on the users to be free from any control

> by the owner of the cable system. . . . [T]he fact that a regulated entity is a common carrier—that under certain circumstances it must provide communications facilities to those who desire access for their own purposes does not render the entity's facilities "public forums" in the First Amendment sense and does not transform the entity's discretionary carriage decisions into decisions of the government. A heavily regulated private carrier of electricity may cut off service without having its decision scrutinized as if it were a state decision, and a private cable operator may refuse to carry indecent programming without having its decision tested by First Amendment principles applicable to the government alone.

All. for Cmty. Media v. F.C.C., 56 F.3d 105, 123, 312 U.S. App. D.C. 141 (D.C. Cir. 1995) (*"ACM"*) (internal citations omitted), *aff'd in part, rev'd in part on other grounds, Denver Area Educ. Telecom. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996).

In *Denver Area Educ. Telecom. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996), the Supreme Court reversed the *ACM* court in part, finding, among other things, that highly restrictive regulations requiring cable operators to segregate certain "patently offensive" programing violated the First Amendment. Justice Breyer's plurality opinion found it "unnecessary" and "unwise" for the Court to "definitively to decide whether or how to apply the public

forum doctrine to leased access channels." *Denver Area*, 518 U.S. at 749. In a concurring opinion, Justice Kennedy opined that public access channels are designated public fora. With references to the legislative history of the Cable Communications Policy Act of 1984 (for which the House Report characterized public access channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet"), as well as the nature of cable franchising arrangements with local municipalities, Justice Kennedy held that it is "clear that when a local government contracts to use private property for public expressive activity, it creates a public forum." *Denver Area*, 518 U.S. at 791-92 (Kennedy, J., concurring) (internal citations omitted).[6]

In dissent, Justice Thomas argued that public access channels are not public fora because: (1) "cable systems are not public property"; (2) "the nature of the regulatory restrictions placed on cable operators by local franchising authorities is not consistent with the kinds of governmental property interests [that] may be formally dedicated as public forums [such as sidewalks, theaters, streets and parks]"; and (3) "the assertion of government control over private property cannot justify designation

6. *See also Denver Area*, 518 U.S. at 791-92 ("Public fora do not have to be physical gathering places, nor are they limited to property owned by the government. Indeed, in the majority of jurisdictions, title to some of the most traditional of public fora, streets and sidewalks, remains in private hands. Public access channels are analogous; they are public fora even though they operate over property to which the cable operator holds title.") (Kennedy, J., concurring).

of that property as a public forum." *Denver Area*, 518 U.S. at 829-831. "Thus, the numerous . . . obligations imposed on the cable operator in managing and operating the public access channels [demonstrate] that these channels share few, if any, of the basic characteristics of a public forum . . . public access requirements . . . are a regulatory restriction on the exercise of cable operators' editorial discretion, not a transfer of a sufficient property interest in the channels to support a designation of that property as a public forum." *Denver Area*, 518 U.S. at 831 (Thomas, J., dissenting).

"Whether courts should apply the traditional First Amendment 'forum analysis' to public access channels at all, or what type of forum courts should deem public access channels to be, remains a complex question after . . . *Denver Area*." *Egli v. Strimel*, No. 14-cv-6204, 2015 U.S. Dist. LEXIS 114312, 2015 WL 5093048, at *4 (E.D. Pa. Aug. 28, 2015). Some courts have held that public access channels are, or at least could be, public fora. *See Egli*, 2015 U.S. Dist. LEXIS 114312, 2015 WL 5093048, at *4 (holding that "at the very least [courts] have 'made clear that the First Amendment does protect the right to free expression on . . . public access cable channels'" and denying a motion to dismiss on that ground) (quoting *Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 50 (D. Maine 2002)); *Jersawitz*, 71 F. Supp. 2d at 1341 ("First Amendment law and the evidence support Plaintiff's contention that People TV's cablecasting facilities are a designated public forum, available to anyone whose videotape meets the technical and content requirements established by People TV and the City"); *Brennan v. William Paterson Coll.*, 34 F. Supp. 3d 416, 428 (D.N.J.

2014) (noting that plaintiff plausibly alleged that cable public access channels were a designated public forum).[7]

Other courts have held that public access channels are not public fora. Notably, that is the consensus view of courts within the Second Circuit. For example, one judge in the Southern District of New York adopted *ACM*'s conclusion and held "that cable access channels are [not] so dedicated to the public that the First Amendment confers a right on the users to be free from any control by the owner of the cable system." *Glendora v. Cablevision Sys. Corp.*, 893 F. Supp. 264, 270 (S.D.N.Y. 1995). And another Southern District judge endorsed that conclusion in *Glendora v. Tele-Commc'ns, Inc.*, No. 96-cv-4270 (BSJ), 1996 U.S. Dist. LEXIS 18650, 1996 WL 721077, at *3 (S.D.N.Y. Dec. 13, 1996) ("[P]ublic access channels are not First Amendment 'public forums."). Similarly, an Eastern District of New York judge adopted the *Glendora* decisions, finding that "courts have routinely held that public access channels are not First Amendment 'public forums' for the purposes of state action." *Morrone v. CSC Holdings Corp.*, 363 F. Supp. 2d 552, 558 (E.D.N.Y. 2005).[8]

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7. *See also Britton v. City of Erie, Pa.*, 933 F. Supp. 1261, 1268 (W.D. Pa. 1995) ("A public-access cable television channel is a public forum.") (citing *Missouri Knights of the Ku Klux Klan v. City of Kansas City, Missouri*, 723 F. Supp. 1347, 1351 (W.D. Mo. 1989)).

8. *See also Griffin v. Public Access Cmty. Tel.*, No. A-10-CA-602-SS, 2010 U.S. Dist. LEXIS 101620, 2010 WL 3815797, at *4 (W.D. Tex. Sept. 27, 2010) ("[A] public access channel is not a public forum."); *Hebrew v. Houston Media Source, Inc.*, No. 09-CV-3274, 2010 U.S. Dist. LEXIS 72876, 2010 WL 2944439, at *6 (S.D. Tex. Jul. 20, 2010) ("[T]his court has found no circuit court or Supreme Court case holding that a public access local cable channel operates

In short, there is no clear precedent governing whether public access channels are public fora. The issue is certainly a close call. However, this Court agrees with those courts in this Circuit and elsewhere which have concluded that public access channels are not public fora. MNN is a private company that operates television channels, and "[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty." *Glendora v. Cablevision Sys. Corp.*, 893 F. Supp. 264, 269 (S.D.N.Y. 1995).[9] Moreover, in *Loce v. Time Warner Entm't Advance/Newhouse P'ship*—the

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as a public forum."); *Wilcher v. City of Akron*, 05-cv-866, 2005 U.S. Dist. LEXIS 9470, 2005 WL 1140676, at *6-8 (N.D. Ohio May 13, 2005) (holding public access channel was not a public forum where there was no "clear bond between the cable operators and local government.").

9. *See also Wilcher v. City of Akron*, 498 F.3d 516, 519 (6th Cir. 2007) ("TV service is not a traditional service of local government. A service provided by a distinct minority of local governments cannot fairly be characterized as a function traditionally reserved to the state."); *Griffin v. Pub. Access Cmty. Television*, No. A10CA602SS, 2010 U.S. Dist. LEXIS 101620, 2010 WL 3815797, at *3 (W.D. Tex. Sept. 27, 2010) ("There are no allegations in the complaint that providing services for individuals to produce public access television shows, or determining the content of a TV channel, is a traditional service of local government. Accordingly, PACT is not a state actor under this test."); *Hebrew v. Houston Media Source, Inc.*, No. 09-CV-3274, 2010 U.S. Dist. LEXIS 72876, 2010 WL 2944439, at *5 (S.D. Tex. July 20, 2010) ("Plaintiff has presented no facts concerning how Defendant's role as a conduit for the production and distribution of local television programs is a traditional service of local government, i.e., a function traditionally reserved to the State. Therefore, Defendant's actions are not fairly attributable to the State under the public function test.").

most apt Second Circuit opinion cited by either side—the Court of Appeals held:

> the fact that federal law requires a cable operator to maintain leased access channels and the fact that the cable franchise is granted by a local government are insufficient, either singly or in combination, to characterize the cable operator's conduct of its business as state action. Nor does it suffice that cable operators, in their management of leased access channels, are subject to statutory and regulatory limitations.

Loce, 191 F.3d 256, 267 (2d Cir. 1999). Though *Loce* addressed leased access—not public access—channels,[10] its holding implicitly rejects Plaintiffs' argument that public access channels are designated public fora because they are "required by government fiat." (Opp'n Br. at 12.) Indeed, the fact that New York's public access channels are required by state regulation means that aggrieved public access producers may pursue regulatory claims even if they do not have First Amendment claims. The PSC regularly holds administrative proceedings to address claims brought by public access producers seeking to challenge public access channel operators' compliance with PSC regulations requiring administration of the channels on a nondiscriminatory basis. *See, e.g.*, *Amano*

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10. "Leased access channels, as distinct from public access channels, are those the cable operator must set aside for unaffiliated programmers who pay to transmit shows of their own without the cable operator's creative assistance or editorial approval." *Denver Area*, 518 U.S. at 794-95 (Kennedy, J. concurring)

v. City of New York, 04-V-0321, 2006 N.Y. PUC LEXIS 271, 2006 WL 4470759 (N.Y.P.S.C. Aug. 30, 2006).

In short, because Plaintiffs cannot establish that MNN was operating a public forum, they fail to plead that MNN was a state actor under Section 1983. Accordingly, Plaintiffs' First Amendment claim is dismissed.

C. State-Law Claims

"Where . . . federal claims are eliminated in the early stages of litigation, courts should generally decline to exercise pendent jurisdiction over remaining state law claims." *Klein & Co. Futures v. Bd. of Trade of City of New York*, 464 F.3d 255, 262 (2d Cir. 2006); *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006). Because Plaintiffs' First Amendment claim has been dismissed, this Court declines jurisdiction over Plaintiffs' state-law claims.

CONCLUSION

Defendants' motion to dismiss is granted. The Clerk of Court is directed to terminate any pending motions and mark this case as closed.

Dated: December 13, 2016
New York, New York

SO ORDERED:

/s/ William H. Pauley III
WILLIAM H. PAULEY III
U.S.D.J.

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MARCH 23, 2018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of March, two thousand eighteen.

Docket No: 16-4155

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Plaintiffs-Appellants,

v.

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE, CITY OF NEW YORK,

Defendants-Appellees.

ORDER

Appellees, Manhattan Community Access Corporation, Daniel Coughlin, Jeanette Santiago, and Cory Bryce, filed a petition for panel rehearing, or, in the alternative, for

rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/_____